

1998

Legislative History in Ohio: Myths and Realities

Maureen Bonace McMahon

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Legislation Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

Maureen Bonace McMahon, *Legislative History in Ohio: Myths and Realities*, 46 Clev. St. L. Rev. 49 (1998)
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol46/iss1/5>

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

LEGISLATIVE HISTORY IN OHIO: MYTHS AND REALITIES

MAUREEN BONACE MCMAHON¹

I. INTRODUCTION	49
II. LEGISLATIVE HISTORY IN OHIO - THE FORMAL VIEW: COMMON PERCEPTIONS AND CONTRADICTORY SIGNALS	50
III. LEGISLATIVE HISTORY IN OHIO - THE REALITY	54
A. <i>Use of LSC Bill Analyses to Confirm the Plain Meaning of the Text</i>	58
B. <i>Use of LSC Bill Analyses to Search for the Intent of the Legislature</i>	61
C. <i>Use of LSC Bill Analyses to Understand the Purpose of the Legislation</i>	63
IV. OHIO LEGISLATIVE SERVICE COMMISSION	65
A. <i>History of LSC</i>	66
B. <i>Bill Analyses</i>	68
C. <i>LSC Staff Today</i>	69
V. A COMPARISON OF FEDERAL AND OHIO LEGISLATIVE HISTORY	74
A. <i>What is Legislative History?</i>	74
B. <i>Political Culture, Legislative Process, and Legislative History</i>	78
VI. ACCESS AND AWARENESS	83
VII. CONCLUSION	89

I. INTRODUCTION

"Ohio has no legislative history." Have you heard someone say this recently? Perhaps another attorney, a law student, or even a lobbyist or legislator? Perhaps you have said it yourself, sagely and confidently? If you are so sure,

¹B.S., The Ohio State University; M.A., The University of Chicago; J.D., 1998, The Ohio State University College of Law. I am particularly grateful to Professor James J. Brudney of the Ohio State University College of Law for encouraging me to write about the creation and use of legislative history in Ohio, and for his comments and suggestions on earlier drafts of this article. I also thank Nancy Rapoport, Dennis Papp, Tatia Gibbons, Ann Thielke, and Alan Wernick for their comments. I thank the staff of Ohio Legislative Service Commission for their patience and cooperation as I studied Ohio legislative process, particularly Shelagh Baker, who provided valuable guidance and training. Any errors are my own.

how do you know? If Ohio has no legislative history, what is it that the Ohio Supreme Court and other Ohio courts have been using and referring to as legislative history in at least fifty cases since 1980?

Why do commentators persist in the belief that there is no legislative history in Ohio when there are so many contrary signals? Does it have something to do with a limited definition of legislative history? Is there a misunderstanding about the link between different political cultures and the records kept within those cultures? Are we in the midst of a time lag before lawyers in Ohio recognize Ohio's particular form of legislative history? Do some lawyers have inside information that others do not have access to? Or are many instead ignoring what is both obvious and readily available?

In this article I will explore what seems to be a prevailing formal view about Ohio legislative history, and the contradictory signals expressed by the Ohio Revised Code and the courts, particularly the Ohio Supreme Court. State statutes are not created in a vacuum. The state legislature has a professional staff. Records are made and preserved. These records include not only all versions of bills, but also analyses of these bills and of their impact on existing law. Ohio courts often cite these records and analyses in decisions.

The true story about Ohio's legislative history was never simple, and it is now a story in the process of change. Telling the story is like putting together a puzzle, except the pieces of this puzzle won't arrive in one box.

In Part Two, I consider the prevailing assumptions about legislative history in Ohio. In Part Three, I examine the reality of judicial use of legislative history in Ohio; Part Four describes the Ohio Legislative Service Commission and its non-partisan legislative staff. Part Five compares federal and Ohio legislative history, and argues that Ohio's legislative process and history are rooted in its political culture. In Part Six, I look at the accessibility of Ohio legislative history and the identities of the lawyers who have used Ohio legislative history in their arguments before courts. When I conclude, I hope to have convinced you to view these things through altered lenses and to consider a different possibility: there is legislative history in Ohio after all.

II. LEGISLATIVE HISTORY IN OHIO - THE FORMAL VIEW: COMMON PERCEPTIONS AND CONTRADICTIONARY SIGNALS

There is an assumption in recent commentaries on Ohio statutes that Ohio legislative history does not exist.² A 1991 law review note declares that "due to the lack of legislative history in Ohio, it is impossible to ascertain exactly what the Ohio legislators contemplated when they passed the Pattern of Corrupt

²See, e.g., Benson A. Wolman, *Separation Anxiety: Free Exercise Versus Equal Protection*, 47 OHIO ST. L.J. 453, 462 (1986) (although criticizing the federal district court's literal reading of an Ohio statute and noting the court's reference to "the absence of any legislative history . . .," the author does not challenge the court's statement regarding the absence of legislative history).

Activities Law."³ The author then refers the reader to an earlier footnote where he makes use of Comments in the Legislative Service Commission (LSC) Summary of Enactments describing the expected effect of the new law.⁴ Here the author diligently tracks down what Ohio courts have in fact referred to as legislative history, but he does not acknowledge it as legislative history.⁵ The author may not know the value of what he has found or he may have a different opinion about the identity of what he has used. Alternatively, perhaps the Summary of Enactments was not helpful or enlightening in this instance.

In another recent article, a different commentator stated there is no legislative history in Ohio,⁶ and cited a 1971 case, *State v. Dickinson*,⁷ as support. Using Ohio's perceived lack of history as a contrast, the commentator later analyzed the legislative history of a closely related federal statute.⁸

It is important to put the *Dickinson* decision in proper perspective; *Dickinson* deserves to be demystified. At issue in *Dickinson* was the intent of the legislature regarding the definition of the word "another" in the vehicular homicide statute.⁹ The Ohio Supreme Court first examined the grammatical construction of section 4511.181 of the Ohio Revised Code to determine if a viable unborn fetus was within the scope of the phrase "the death of another" in a vehicular homicide law. It determined that the word "another" was used by the General Assembly with reference to the word "person" in the first part of the sentence, "No person shall deliberately cause the death of another."¹⁰ The court consulted section 4511.01(V), which defined person as "every natural person" and was *in pari materia* with section 4511.181, and then consulted Webster's Dictionary, which defined "natural" as existing from birth. These sources indicated that the

³Donald Cosmo Ligorio, Note, *Ohio's Pattern of Corrupt Activities Law: Ohio Revised Code Sections 2923.31-.36*, 17 DAYTON L. REV. 279, 284 n.43 (1991) (comparing Ohio law, federal law, and the law of other states regarding racketeering).

⁴*Id.* at 281, n.12. The Summary of Enactments the author refers to is a summary of Legislative Service Commission analyses of bills enacted during each General Assembly and published by LSC. *Id.* Bill analyses will be described and discussed extensively later in this article.

⁵*See id.* at 280, 281, 284, 304 n.160.

⁶*See* Max Kravitz, *Ohio's Administrative License Suspension: A Double Jeopardy and Due Process Analysis*, 29 AKRON L. REV. 123 (1996).

⁷*State v. Dickinson*, 275 N.E.2d 599 (Ohio 1971).

⁸*See* Kravitz *supra* note 6, at 159-63; *see also* Thomas R. Goots, Comment, "A Thug in Prison Cannot Shoot Your Sister": Ohio Appears Ready to Resurrect the Habitual Criminal Statute—Will it Withstand an Eighth Amendment Challenge? 28 AKRON L. REV. 253, 270 & n.121 (1995)(asserting a lack of state legislative history).

⁹*See Dickinson*, 275 N.E.2d at 600 (citing OHIO REV. CODE ANN. § 4511.181 (Anderson 1990)). The vehicular homicide statute is now found in sections 2903.06-.07.

¹⁰*Id.*

General Assembly did not intend the word "person" to include a viable unborn fetus.¹¹

The court then went on to make the following statement: "To substantiate this intent, this court will look beyond the statute. . . . Further, since no legislative history of statutes is maintained in Ohio, we must look to the source of the statute and to judicial pronouncements to determine the meaning of the word in question."¹² There is no evidence in the lower court decisions of any attempt to introduce legislative history, so apparently none was rejected.¹³

Interestingly, after the court remarked that no legislative history is maintained in Ohio, it proceeded in the next paragraph to discuss the *history* of section 4511.181 and how this *history* indicated that there had been little change in the pertinent wording of this statute since it first became law.¹⁴ The court was looking at earlier versions of the homicide statute, going back in time to the laws of Northwest Territory, and also to the 1935 Ohio statute that created the additional offense of manslaughter in the second degree.¹⁵

One might surmise that the court was referring to another type of legislative history when it declared that none was maintained in Ohio. The previous version of a law is a type of legislative history, and this type of history is maintained in Ohio.¹⁶

Absent from *Dickinson* is a citation to the Ohio Supreme Court's decision one term earlier in *Cleveland Trust Co. v. Eaton*. The court in *Eaton* refused to rely upon a particular bill analysis from LSC as evidence of legislative intent in that instance.¹⁷ The *Dickinson* court does not cite *Eaton* as authority, and there is no evidence that a LSC bill analysis was offered in argument.

¹¹*Id.*

¹²*Id.*

¹³See *State v. Dickinson*, 248 N.E.2d 458 (Ohio Misc. 1969), *rev'd*, 263 N.E.2d 253 (Ohio Ct. App. 1970).

¹⁴See *Dickinson*, 275 N.E.2d at 600.

¹⁵*Id.* at 601 & n.3.

¹⁶See DAVID M. GOLD, OHIO LEG. SERV. COMM'N, A GUIDE TO LEGISLATIVE HISTORY IN OHIO 3.

A researcher may begin the examination of a statute's legislative history by comparing the statute in question with its predecessor or successor acts. The versions of the Revised Code published by Anderson and Baldwin include after each section citations to earlier codifications and to the session laws that enacted or amended the section. . . . Until 1927, the session laws did not indicate the changes in existing law made by each new act; to determine what they were the researcher must set the old and new laws side by side and compare them.

Id.

¹⁷*Cleveland Trust Co. v. Eaton*, 256 N.E.2d 198 (Ohio 1970) (reporting that a LSC bill analysis was offered as evidence of legislative intent by appellee Eaton's attorneys, and was rejected as such by the court). See discussion *infra* Part III.

A number of clues in *Dickinson* suggest that the court was talking about a detailed legislative record of commentary on a pending bill similar to that generated by Congress when it stated that no legislative history was maintained in Ohio. It did look at past versions of statutes, and thus could not have meant that Ohio did not keep records of old versions of statutes. It did not refer to the recent *Eaton* decision, so it may not have been rejecting that particular form of history.¹⁸

Numerous authors have used LSC bill analyses and other LSC sources to aid in understanding a new development in state law. Most of these authors use the sources without making definitive statements about whether or not legislative history exists in Ohio. One author stands out by directly acknowledging LSC bill analyses as helpful in determining legislative intent.¹⁹ In 1983 and 1985, commentators demonstrated familiarity with LSC sources.²⁰ In 1994 and 1995, commentators referred to LSC documents for information about legislation.²¹ Several out-of-state journals have cited LSC interim research reports as part of nationwide surveys on broad topics.²² Law journal student notes make use of LSC materials to understand recent development in the law; some use the LSC materials to understand the legislative intent without explicitly acknowledging the source as legislative history.²³ Others

¹⁸Contrast this with Max Kravitz's article citing *Dickinson*. Perhaps Kravitz meant that Ohio did not have legislative history comparable in scope and scale to that of Congress. He may also have believed that the appropriate standard for legislative history was a federal standard, and Ohio and federal legislative history are not the same in format, scope or quantity. See generally Kravitz, *supra* note 6.

¹⁹See James Leonard, *A Select Annotated Bibliography of Ohio Practice Materials*, 17 OHIO N.U.L. REV. 265, 270-72 (1991) (describing the research sources in Ohio that are useful for determining legislative intent and including LSC bill analyses as useful sources).

²⁰See Charles E. Wilson, *The Replacement of Lawful Economic Strikers in the Public Sector in Ohio*, 46 OHIO ST. L.J. 639, 664 & n.175 (1985) (citing an interview with a LSC research associate); James T. O'Reilly and Neil Gath, *Structures and Conflicts: Ohio's Collective Bargaining Law for Public Employees*, 44 OHIO ST. L.J. 891, 909, 918 (1983) (citing LSC bill analyses).

²¹See Louis F. Lobenhofer, *Limited Liability Entities in Ohio: A Primer on the Limited Liability Company and Partnership with Limited Liability, Their Substantive and Tax Aspects*, 21 OHIO N.U.L. REV. 39, 102 n.515 (1994); Teri G. Rasmussen, *New Laws Governing Checks and Negotiable Instruments Under U.C.C. Articles 3 and 4: What Does it Mean to Financial Institutions in Ohio?* 24 CAP. U.L. REV. 507, 511 n.7 (1995).

²²See Samuel R. Gross and Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 40 n.52 (1984) (citing Ohio Legislative Service Staff Research Report No. 46 on Capital Punishment, 1961); Yao Apasu-Gbotsu, Survey, *The Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 655 (1986) (citing a Ohio Legislative Service Commission Summary of a part of the new criminal code, 1972).

²³See Susan R. Bell, Comment, *Ohio Gets Tough on Juvenile Crime: An Analysis of Ohio's 1996 Amendments Concerning the Bindover of Violent Juvenile Offenders to the Adult System and Related Legislation*, 66 U. CIN. L. REV. 207, 223 n.141, 229 n.195 (1997); Julian B. Bell III, Comment, *Ohio's Lemon Law: Ohio Joins the Rest of the Nation in Waging War Against*

refer to LSC staff without an understanding of their role in the legislative process.²⁴ Finally, a commentator recently accused the LSC Division of Code Revision of making an error because Ohio law was different from the law in most other states.²⁵ These commentaries illustrate a lack of agreement about how to classify and describe what is available in Ohio. Moreover, the prevailing statements that are specifically directed at the existence of legislative history in Ohio ignore two elements actually used by courts: prior versions of bills and LSC bill analyses.

III. LEGISLATIVE HISTORY IN OHIO - THE REALITY

In the same year as the *Dickinson* opinion, Ohio legislators were writing into the General Provisions of the Ohio Revised Code some new rules of statutory construction. In September of 1971, the General Assembly passed section 1.49, which allows courts to consider legislative history among other things when determining legislative intent.²⁶ The bill was passed on September 20, 1971, signed and approved by the governor on October 4, 1971, to be effective January 3, 1972. The Ohio Supreme Court decided *Eaton* on March 4, 1970 and *Dickinson* on Nov. 24, 1971. The LSC bill analyses for each version of the bill do not state that the law is a response to a particular judicial decision, but do state

the Automobile Limited Warranty, 57 U. CIN. L. REV. 1015, 1029 n.97 (1989); Dominick Cirelli, Jr., Comment, *Utilizing School Voucher Programs to Remedy School Financing Problems*, 30 AKRON L. REV. 469, 500 n.30 (1997); Kyle A. Knapp, Comment, *One Cannot Serve Two Masters: Solving the Inherent Conflicts of Interest in Statutory Legal Counsel for Ohio School Boards*, 26 CAP. U.L. REV. 141, 166; Matthew Devery McCormack, Comment, *Tracking Ohio Insurance Coverage: The Genesis and Demise of Savoie*, 20 DAYTON L. REV. 293, 328 (1994); Douglas Schwartz, Comment, *The Tortured Path of Ohio's Collateral Source Rule*, 65 U. CIN. L. REV. 643, 659 nn.148 & 150 (1997); Elizabeth J. Watters, Comment, *State v. Collins: Is the Impossible Now Possible in Ohio?* 51 OHIO ST. L.J. 307, 320 & n.95 (1990).

²⁴See Judith Lynn Bick Rice, Note, *The Need for Statutes Regulating Artificial Insemination by Donors*, 46 OHIO ST. L.J. 1055, 1065 n.119, 1071 n.171, 1072 (1985) (stating at one point that there is no legislative history in Ohio, then later describing LSC staff as drafting its own legislation and making recommendations to the members about the content of bills).

²⁵See Bruce A. Campbell, *Trouble: Ohio's Non-Uniform Definitions of Accommodation and Accommodated Parties in Revised Article Three of the Uniform Commercial Code and What to do About Them*, 28 U. TOL. L. REV. 319, 325 (1997).

²⁶Section 1.49 of the Ohio Revised Code regarding "ambiguous terms" reads:

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: (A) the object sought to be attained; (B) The circumstances under which the statute was enacted; (C) The legislative history; (D) The common law or former statutory provisions, including laws upon the same or similar subjects; (E) The consequences of a particular construction; (F) The administrative construction of the statute.

OHIO REV. CODE ANN. § 1.49 (Anderson 1990). Section 1.49 does not define "legislative history" and that term is not defined elsewhere in the Ohio Revised Code.

that the law "revised the definitions and rules of statutory construction which are applicable to the entire Revised Code."²⁷ The session laws do not provide intent language for the statute, but section 1.49 is newly enacted law rather than amended law.²⁸

According to a historical record compiled by David Gold in 1985, Ohio courts have used various sources for legislative history, even prior to 1971.²⁹ In 1841, the Ohio Supreme Court examined the history of a statute to determine the intention of the legislature, and found that history in the House and Senate Journals.³⁰ The House and Senate Journals, although providing a limited record, have always been respected and have been given more weight than any other source of legislative history, except prior versions of the statutes.³¹

Gold demonstrates the courts' use of other types of sources, ranging from predecessor statutes, session laws which show deleted and new language,³² the title of an act,³³ headings given to a statute,³⁴ special studies and research reports produced by LSC, LSC bill analyses, and the Summary of Enactments.³⁵ These sources are formally produced during the legislative process.³⁶ The courts have occasionally cited other sources or records that are "official in

²⁷ See LSC Bill Analyses of H.R. 607, for H. Third Reading; Am. H.R. 607 for H. Third Reading and S. Judiciary; and Am. H.R. 607 for H. Third Reading, S. Judiciary and S. Third Reading, 109th Gen. Assembly (Ohio 1971).

²⁸ See 1972 Ohio Laws 134.

²⁹ See GOLD, *supra* note 16, at 2.

³⁰ See *State ex rel. Peters v. McCollister*, 11 Ohio 46, 56 (1841). "I am aware that every statute should speak for itself, and be constructed by itself; but if there be doubt as to its construction, resort may be had to extraneous matters, and nothing of this kind is more satisfactory than the journals of the body by which it was enacted." *Id.*

³¹ See GOLD *supra* note 16, at 7, 8. The House and Senate Journals are published each day that the chamber is in session. They record the procedural actions taken on bills: introductions, referrals to and reports by committees, floor motions, and votes. The Journals print the sponsors and titles of bills, but not the full texts. They do furnish the texts of amendments either recommended by the reporting committee, or proposed on the floor, with deletions indicated by strike-throughs and insertions shown by capital letters. According to Gold, "Reliance on the Journals for legislative history has never been questioned." *Id.*

³² *Id.* at 3.

³³ *Id.* at 4.

³⁴ *Id.* at 5.

³⁵ *Id.* at 9. A bill analysis is written for every version of a bill introduced. The Summary of Enactments is published for each Assembly, and provides a synopsis of all bills enacted since the previous Summary. A condensed form of the analysis of the enacted bill is included in the Summary and is often referred to by courts as the LSC "Comment" or "Summary." The Summary of Enactments is now called the Digest of Enactments; the change took effect for the 122nd General Assembly. See OHIO LEGIS. SERV. COMM'N, A GUIDEBOOK FOR OHIO LEGISLATORS 56-58 (6th ed. 1997) [hereinafter GUIDEBOOK].

³⁶ See GOLD, *supra* note 16, at 10.

nature but not prepared under authority of the General Assembly" such as a uniform act or model law, the interpretation of federal law when Ohio law is based upon it, and laws of other states when Ohio has adopted provisions from that state.³⁷ The courts have considered some "unofficial or quasi-official" sources, such as "statements of sponsoring legislators, bar committee reports, recommendations of administrative officers, and contemporaneous construction by the legal profession."³⁸

Ohio courts have increasingly used LSC bill analyses over the past two decades. Since the Ohio Supreme Court's decision in *Meeks v. Papadopoulos*³⁹ in 1980, both the supreme court and lower courts have relied on the bill analyses by the General Assembly's non-partisan professional legislative staff at the Ohio Legislative Service Commission as evidence of legislative intent and have described the bill analyses as legislative history.⁴⁰

The first noteworthy mention of LSC bill analyses was in 1970. Attorneys for the defendant in *Eaton* attempted to use a LSC analysis to argue about the intention of words used in a statute. The court expressed a preference for relying on the plain meaning of the text as its rule of construction when the text is plain and unambiguous.⁴¹ The court responded to the LSC bill analysis, called a "report" by the court, by stating its opinion that "a report of the LSC, with respect to proposed legislation, may not be used to give meaning to a legislative enactment other than that which is clearly expressed by the General

³⁷See *id.* at 11.

³⁸See *id.* at 12. Researchers will find the published sources are widely available. These are the House and Senate Journals (and the Bulletin, an index to the Journals), and the Summary or Digest of Enactments. In addition, LSC keeps all versions of bills introduced on file for four years; microfilm of older bills are kept in the LSC library, the Supreme Court Library, the Ohio State University (OSU) College of Law Library, and the state archives of the Ohio Historical Society. The microfilmed records of all version of bills introduced go back to the 68th General Assembly or 1886. LSC bill analyses of bills introduced have been microfilmed and retained since 1961 and are available at the LSC library, the Supreme Court Library, and the OSU College of Law library. The Supreme Court Library also maintains hard copies of bill analyses from 1991 to the present. An on-line news service called Hannah Information Systems carries the text of bills introduced and the bill analysis of the enacted versions of the bill. *The LSC library is open to the public but maintained by the General Assembly primarily for the use of legislators; the General Assembly has not provided staff to assist other researchers.* Interview with Debbie Tavenner, LSC Library Administrator, in Columbus, Ohio (July 28, 1997). Notes of all interviews herein are on file with author.

³⁹*Meeks v. Papadopoulos*, 404 N.E.2d 159 (Ohio 1980).

⁴⁰See William J. Heaphy, III, *Judicial Use of LSC Analyses, Summaries, and Reports as "Legislative History,"* presented at a Public Practice Continuing Legal Education Seminar, October 18, 1996, (reporting an increase in the mention of LSC documents in court opinions during the period from approximately 1970 to 1996). *Meeks* was also cited in GOLD, *supra* note 16, at 9 n.26.

⁴¹*Eaton*, 256 N.E.2d at 204 (Ohio 1970).

Assembly."⁴² Then, after acknowledging that the LSC report in question was "distributed to members of the General Assembly, to the press and to others interested in the proposed act" it went on to say that the LSC Comment "was not made a part of the record of the General Assembly and has not otherwise been published and is not generally available even in the best of the law libraries in this state."⁴³ The Ohio Supreme Court was clearly mistrustful, but left open the possibility of relying upon bill analyses under different circumstances, such as ambiguous text.

LSC bill analyses were mentioned in at least seven decisions between 1970 and 1980, but the significant change in direction came in 1980.⁴⁴ In *Meeks*, the court responded quite differently to the prosecuting attorney's proffer of a LSC bill analysis to aid in construing a recently enacted law.⁴⁵ The court noted that disagreement between the trial and appellate courts indicated that the statute's language was ambiguous.⁴⁶ It then noted that the legislature, in enacting section 1.49 of the Ohio Revised Code, had explicitly permitted courts to consider legislative history, in order to help it determine the intention of the legislature. The LSC bill analysis was described as an

analysis of [the House Bill] during the time it was introduced, voted upon, and passed by the Ohio Senate and House of Representatives. Although this court is not bound by such analyses, we may refer to them when we find them helpful and objective. This *legislative history* indicates that the Commission, in analyzing the bill . . . informed the members of the General Assembly that Sub.H.B. 201 excluded [certain] "public employers" from statutory coverage.⁴⁷

The court also cited Ohio common law, holding that "statutes are to be read in the light of attendant circumstances and conditions, and are to be construed as

⁴²*Id.*

⁴³*Id.* The court had relied on the House and Senate Journals of the General Assembly in the past, *see supra* note 30. Courts may refer to LSC bill analyses as reports, comments, or summaries. A bill analysis has a Comment subsection, and the Summary or Digest of Enactments contain excerpts from bill analyses of enacted bills.

⁴⁴*See* Heaphy, *supra* note 40, at 30-33 (listing cases prior to *Meeks* where the court referred to LSC documents for additional information about a statute). *See, e.g.,* State *ex rel.* Cincinnati Bell v. Industrial Comm'n, 378 N.E.2d 160, 162 (Ohio 1982); Williams v. Akron, 374 N.E.2d 1378, 1382 n.2 (Ohio 1978); State v. Lockett, 358 N.E.2d 1062, 1071 (Ohio 1976); ITT Canteen Corp. v. Porterfield, 283 N.E.2d 124, 125 (Ohio 1972); Weiss v. Porterfield, 271 N.E.2d 792, 794 (Ohio 1971). In these cases the Supreme Court used LSC documents in its analysis but did not describe them as "legislative history."

⁴⁵*See Meeks*, 404 N.E.2d at 162 (Ohio 1980).

⁴⁶*Id.*

⁴⁷*Id.* (emphasis added).

they were intended to be understood when they were passed,"⁴⁸ as further support for use of the LSC bill analysis.

The *Meeks* court called attention to LSC bill analyses as legislative history in three different ways. First, it directly referred to a LSC bill analysis as legislative history. Second, it indicated that the bill analysis was helpful and objective in the context of construing an ambiguous statute. Third, it implied that the LSC bill analysis was a relevant "attendant circumstance" when it relied on case law to support the use of attendant circumstances surrounding the enactment of the statute.⁴⁹ Since *Meeks* was decided, LSC documents have been cited in over 45 Ohio Supreme Court cases, 93 appellate court cases, 56 unreported appellate court cases, and 10 miscellaneous cases, often as evidence of legislative intent and as "legislative history."⁵⁰

Ohio courts use LSC bill analyses to serve three principal objectives. These are A) to confirm and support the court's reading of the plain meaning of the text; B) to aid in construing ambiguities in the text by searching for the intent of the legislature; and C) to contribute to the court's understanding of the purpose of the legislation.⁵¹ I have chosen fourteen recent examples from the Ohio Supreme Court to illustrate how judicial reliance on LSC analyses serves each of these three objectives.⁵²

A. Use of LSC Bill Analyses to Confirm the Plain Meaning of the Text

In *Felton v. Felton*, the question was whether a court may issue a domestic protection order even when the parties have already agreed to a no-harassment provision in a separation agreement.⁵³ Initially the court noted that the statute granting the right to ex parte hearings to issue a temporary protection order provided in plain language that the remedies "are in addition to, and not in lieu

⁴⁸*Id.* (quoting *Miller v. Fairley*, 48 N.E.2d 217 (Ohio 1943)).

⁴⁹*Meeks*, 404 N.E.2d at 162.

⁵⁰See Heaphy, *supra* note 40 (partial list). In addition, I conducted a boolean search on LEXIS, using the search terms "Legislative Service Commission," which retrieved a total of 213 cases through 1997, including all cases where the phrase was mentioned, for a total of 54 Ohio Supreme Court cases, including *Eaton* and its progeny, 92 appellate court cases, 55 unreported appellate court cases, and 10 miscellaneous cases. Search of Lexis, States Library, OHCTS File (Mar. 22, 1998).

⁵¹*Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353 & n.123 (1990) (illustrating, by use of a "funnel of abstraction," the "hierarchy of sources" a judge could rely upon when interpreting a statute, beginning with text as the most authoritative source; then, going up the funnel, evidence of legislative intent in the legislative history; "imaginative reconstruction" of what the legislature would have done if it had known of the problem facing the court; the purpose or mischief the statute was designed to remedy; and, a search for the "best answer" to the problem).

⁵²I limited my total search to the end of 1997. Thirteen of these cases are discussed in the text and one is presented in a footnote.

⁵³*Felton v. Felton*, 679 N.E.2d 672 (Ohio 1997).

of, any other available civil or criminal remedies."⁵⁴ Thus, protection orders were not precluded by the dissolution decree. The LSC bill analysis of the enacted bill stated that "[t]he General Assembly enacted the domestic violence statutes specifically to criminalize . . . domestic violence and to authorize a court to issue protection orders designed to ensure the safety and protection of a complainant in a domestic violence case."⁵⁵ The court reasoned that this extensive authority was intentionally granted to trial courts so that they could tailor protection orders for victims of domestic violence, in contrast to the general nature of the authority granted to courts by the dissolution decree's no-harassment provision.⁵⁶ The protection orders also granted protective features not found in a dissolution decree, which the court elaborated upon in detail.⁵⁷ The plain language of the statute supported the courts findings, but the court of appeals had ruled that the protection order was superfluous when a no-harassment provision existed. The court used the LSC analysis for emphasis and support of its construction of the statute's plain language.⁵⁸

In *State v. Moaning*, the issue was whether the legislature intended to prohibit a person who had been convicted of attempted drug abuse, and not actual possession or use, from carrying a firearm, under the statute that prohibited having a weapon while under disability.⁵⁹ The court looked at the statute's language to ascertain intent, and then decided its interpretation was consistent with the LSC analysis, which the court found "persuasive to the extent that it provide[d] insight into the legislature's analysis when drafting the law."⁶⁰ The court believed the LSC comment showed that the legislature intended to broaden the scope of the disability statute to include those individuals.⁶¹

Office of Consumers' Counsel v. Pub. Utilities Commission of Ohio was an appeal by OCC of an application for a rate increase granted by PUCO to a small telephone company.⁶² One of the issues was whether the legislature actually

⁵⁴*Id.* at 674.

⁵⁵*Id.* (omissions in original).

⁵⁶*Id.* at 675.

⁵⁷*Id.* at 675-76.

⁵⁸*See Felton*, 679 N.E.2d at 672, 674.

⁵⁹*State v. Moaning*, 666 N.E.2d 1115 (Ohio 1996); OHIO REV. CODE ANN. § 2923.13-.14 (Anderson 1990 & Supp. 1997).

⁶⁰*Moaning*, 666 N.E.2d at 1116.

⁶¹*See id.* (quoting LSC bill analysis of Section 2923.13 of the Ohio Revised Code, "This section is similar to a former prohibition against weapons in the hands of bad risks, including fugitives, certain felons, drug dependent persons, alcoholics, and mental incompetents. The section *expands* upon the former law by including within the prohibition persons under indictment for or who have been convicted of any felony of violence or any drug abuse offense." (emphasis added, alteration in original)).

⁶²*Office of Consumers' Counsel v. Public Utilities Comm'n*, 638 N.E.2d 550 (Ohio 1994).

intended to dispense with the notice and hearing requirements in the ratemaking process for small telephone companies, in contrast to the traditional ratemaking process, where ratepayers and the OCC did participate.⁶³ The court held that the legislature departed from the traditional ratemaking process of quasi-judicial hearings and had delegated authority to PUCO to exempt small telephone companies entirely when it enacted section 4927.04(B).⁶⁴ This exemption made the process for these small companies legislative, with no opportunity for notice and hearing. The court used the LSC bill analysis, which confirmed the intent to dispense with notice and hearing for small telephone company ratemaking, to support its reading of the statute.⁶⁵

In *Harris v. Atlas Single-Ply Systems*, the issue was whether the language of the statute of limitations regarding unpaid minimum wages could be applied to require that the Department of Industrial Relations bring an action on behalf of employees for the payment of prevailing wages within two years.⁶⁶ The majority used the canon *expressio unius est exclusio alterius*, reasoning that section 2305.11(A) expressly mentioned unpaid overtime compensation and unpaid wages, but was silent with respect to prevailing wages. This suggested to the court a legislative intent to exclude the term. The court added that minimum wage laws and prevailing wage laws were enacted with different purposes in different chapters of the code.⁶⁷ The concurring opinion cited an earlier decision, including a quote of the LSC summary of the bill, to conclude that any limitation periods in section 2305.11 applied only when a prevailing wage violation existed, and did not apply in this case.⁶⁸

State ex rel. v. Voinovich was a challenge to the constitutionality of a workers' compensation appropriations bill, where two of the four issues presented were whether the bill violated the three-consideration provision and the one-subject rule of the Ohio Constitution.⁶⁹ The dissent argued that the original simple appropriations bill now contained "massive substantive law changes to the workers compensation system," including changes to the structure of the administration, limitations on the authority of the Industrial Commission,

⁶³See *id.* at 554.

⁶⁴*Id.*

⁶⁵See *id.* The court also quoted from and relied on testimony on behalf of the Ohio Telephone Association to support its construction of the intent of the statute and PUCO's regulations. *Id.* Records of testimony before committees are not retained in a consistent manner in Ohio.

⁶⁶*Harris v. Atlas Single-Ply Sys.*, 593 N.E.2d 1376 (Ohio 1992).

⁶⁷*Id.* at 1378; see also OHIO REV. CODE ANN. § 2305.11(a) (Anderson 1990 & Supp. 1997).

⁶⁸*Harris*, 593 N.E.2d at 1378 (quoting *Harris v. Van Hoose*, 550 N.E.2d 461, 463 (Ohio 1990)).

⁶⁹See *State ex rel. v. Voinovich*, 631 N.E.2d 582 (Ohio 1994). See also Am.Sub.H.R. 107, 120th Gen. Assembly (Ohio 1995).

elimination of regional boards, limitations on rights of injured workers, incentives for employer resistance, changes in standard of proof for tort claims, and privatization of the rehabilitation program.⁷⁰ The dissent found that the "magnitude of the changes by the legislation is demonstrated by the LSC Comparison of Current and Prior Workers' Compensation Law and Provisions of Am. Sub.H.B.107. It takes twenty pages to list the changes made by the bill."⁷¹ The dissent used House and Senate Journals, as well as the LSC analysis contrasting existing law with proposed changes, and case law, in its argument that the bill was logrolling, "the practice by which several matters are consolidated in a single bill for the purpose of obtaining passage for proposals which would never achieve a majority if voted on separately,"⁷² and that the legislature was violating the one-subject rule.⁷³

B. Use of LSC Bill Analyses to Search for the Intent of the Legislature

In *State v. Williams*, the sole issue was whether there was sufficient evidence that appellee and appellant were family or household members, as defined by statute, in order to convict appellee of violating a domestic violence statute.⁷⁴ The court held that the offense of domestic violence arose out of the relationship of the parties rather than out of their living circumstances.⁷⁵ The statute protected "family or household members," which included cohabitants, but "cohabitant" was not defined.⁷⁶ Appellee argued that cohabitation required that the two had lived together. The court's reasoning began with its reference to a case decided earlier the same year that had cited a LSC bill analysis. That analysis said that "the General Assembly enacted the domestic violence statutes specifically to criminalize those activities commonly known as domestic violence. . . ."⁷⁷ The court then looked at research studies of domestic violence victims, which established that the offense arose out of the relationship itself, and not out of the sharing of the same address.⁷⁸ The court reasoned that because the General Assembly recognized the special nature of domestic violence by providing special protections such as temporary protection orders, it clearly believed that assault on or by a family or household member deserved

⁷⁰See *Voinovich*, 631 N.E.2d at 601.

⁷¹*Id.*

⁷²*Id.* at 602 (quoting *Hoover v. Board of Franklin County Commissioners*, 482 N.E.2d. 575, 580 (Ohio 1985) which cited the definition of logrolling in *State ex rel. Dix v. Celeste*, 464 N.E.2d. 153 (Ohio 1984)).

⁷³*Id.* at 601-02.

⁷⁴*State v. Williams*, 683 N.E.2d 1126, 1127 (Ohio 1997).

⁷⁵*Id.* at 1129.

⁷⁶See OHIO REV. CODE ANN. § 2919.25 (Anderson 1997).

⁷⁷See *Williams*, 683 N.E.2d at 1128.

⁷⁸*Id.* at 1128-29.

more protection than assault by a stranger.⁷⁹ Then the court looked at case law for definitions of cohabitation and decided that the essential elements were found in the relationship, and the intimacy of the relationship, not in sharing the same address.⁸⁰ In this case, the court went beyond the statute to define the scope of the relationship of those protected by the statute, using a combination of legislative intent to protect victims of domestic violence, studies identifying the victims of domestic violence, and case law defining cohabitation.

In *State ex rel. Toledo Edison v. City of Clyde*, at issue was whether the Miller Act required the Public Utilities Commission of Ohio to review abandonment or closing of the Toledo Edison electric facility in Clyde, and whether the Miller Act protected Toledo facilities to the extent that Clyde could not serve future new customers with its own electric utility after Toledo's franchise expired.⁸¹ The court began by stating it would review the history of the Miller Act, passed in 1919, which it found "susceptible of more than one interpretation."⁸² It reviewed preenactment wording changes, considered policy implications, considered industry meaning of certain key terms, and cited a LSC bill analysis of the 1978 Certified Territory Act and the language of a section of that Act, together with related case law, to support its holding that Clyde could control operation of utilities within its boundaries after the franchise expired.⁸³

In *In re Annexation of 311.8434 Acres of Land v. Lewis* the issue was whether township trustees could appeal the approval of a landowner's petition for annexation.⁸⁴ This case involved an alleged conflict between statutory remedies provided in two different statutes. The court ultimately relied on an LSC bill analysis which explained that the amendment to section 505.62 was "only a response to this court's prior determination that township trustees lacked standing in an appeal from the denial of a petition for annexation. The amendment . . . did not change the procedure for challenging the allowance of a landowner's petition for annexation."⁸⁵ Here the court looked at bill analyses for different bills to sort out the intent of the legislature, and reversed the court of appeal's holding that the statutes allowed concurrent remedies.

In *State v. Economo*, at issue was what quality of other evidence was necessary to satisfy the corroboration requirement of the sexual imposition statute, which

⁷⁹*Id.* at 1129.

⁸⁰*Id.* at 1130.

⁸¹*State ex rel. Toledo Edison Co. v. City of Clyde*, 668 N.E.2d 498 (Ohio 1996).

⁸²*Id.* at 504.

⁸³*See id.* at 506.

⁸⁴*In re Annexation of 311.8434 Acres of Land v. Lewis*, 597 N.E.2d 460 (Ohio 1992).

⁸⁵*See id.* at 462 (quoting from LSC Bill Analysis of amendment to OHIO REV. CODE § 505.62 which reported the Ohio Supreme Court ruling in *In re Appeal of Bass Lake Community*, 449 N.E.2d 771 (Ohio 1983), that boards of township trustees lacked standing in an appeal of a denial of an annexation petition. . . . The bill should confirm standing. . . .) (omissions added).

only required that "no person shall be convicted of a violation of this section solely upon the victim's testimony unsupported by other evidence."⁸⁶ The court ignored the justification provided for the corroboration rule in the LSC analysis, which stated the rule was justified because of the ease with which this crime may be abused in prosecution, and instead decided to leave to trial courts the responsibility of ensuring that convictions for sexual imposition are based on sufficient evidence.⁸⁷ The prosecution had used the bill analysis as part of its argument to abolish the corroboration requirement as unwise intent on the part of the legislature, and the defendant had used the same analysis to support its case for the requirement of more evidence. The court did not abolish the requirement as requested by the prosecution, but did not require more evidence as requested by the defendant. It used the LSC analysis as grist for its attack on the legislature's differential treatment of the victims of this type of crime.⁸⁸ Implicit in this attack on the legislature was an assumption that the bill analysis reflected the legislative intent to keep the corroboration requirement.⁸⁹

C. Use of LSC Bill Analyses to Understand the Purpose of the Legislation

In *Zalud Oldsmobile Pontiac, Inc. v. Tracy*, an appeal from the Board of Tax Appeals, one issue was whether a section of the Ohio tax code violated the federal Equal Protection Clause by treating taxpayers differently without a rational basis.⁹⁰ The court held that the General Assembly intended to adjust certain depreciation expenses in response to federal tax changes in order to maintain constant tax revenues and return windfalls to the taxpayer. The court began its analysis of the statute with the LSC bill analysis of an earlier bill, which explained the interaction of the Federal Economic Recovery Act of 1981 with Ohio tax law and the intent of the Ohio bill to change computation of corporate net income in specific years only, and also cited *The Journal of State Taxation*, before it arrived at its conclusion that the legislature had a legitimate purpose to keep revenues level and a rational basis to sustain that purpose.⁹¹

In *State v. Lovejoy*, the issue was "whether the doctrines of double jeopardy and collateral estoppel apply when a jury finds a defendant not guilty as to some counts and is hung as to other counts."⁹² The court held that the doctrines did not apply when the inconsistency arose out of responses to different counts.

⁸⁶*State v. Economo*, 666 N.E.2d 225, 227 (1996) (quoting OHIO REV. CODE § 2907.06(B)).

⁸⁷*Id.* at 230.

⁸⁸The court adopted Judge Nugent's dissent to the Court of Appeals of Cuyahoga County decision. See *State v. Economo*, No. 66408, 1994 WL 693485, at *5 (Ohio Ct. App. 8th Dist. Dec. 8, 1994).

⁸⁹See *Economo*, 666 N.E.2d at 229.

⁹⁰*Zalud Oldsmobile Pontiac, Inc. v. Tracy*, 671 N.E.2d 32 (Ohio 1996).

⁹¹See *id.*

⁹²*State v. Lovejoy*, 683 N.E.2d 1112, 1114 (Ohio 1997).

The dissent argued that the doctrine of double jeopardy did apply, because the separate offenses shared common issues. The dissent relied primarily on case law, but also cited a LSC bill analysis of the robbery statute that stated "the offense can be a lesser included offense to both forms of aggravated murder" as part of its argument that both counts involved the same victim, conduct, and proof.⁹³

In *State v. Smith*, a death penalty appeal, the court rejected the defendant's double jeopardy argument in favor of a single prison sentence for two counts of aggravated robbery.⁹⁴ The court stated that injury as an element of aggravated robbery was inflicted on separate victims, and thus the offenses were separate. The reasoning was supported by a LSC analysis of the aggravated robbery statute. The Comment section of the bill analysis stated that "[A] thief who . . . steals different property from three separate victims . . . can be charged with and convicted of all three thefts."⁹⁵

State v. Awkal was another death penalty appeal.⁹⁶ The defendant argued that the shooting was spur of the moment and thus an impulse murder, raising the issue of whether length of time pondering the crime determined whether he acted with prior calculation and design.⁹⁷ The court cited a LSC bill analysis from *State v. D'Ambrosio*.⁹⁸ The LSC Comment defined prior calculation and design to require "a scheme designed to implement the calculated decision to kill. . . . neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves . . . momentary deliberation is insufficient."⁹⁹ The court supported its decision that there was sufficient evidence the accused acted with prior calculation with the bill analysis explaining the statute.¹⁰⁰

As these cases strongly suggest, Ohio courts generally have not used legislative history to override the plain meaning of the text. Section 1.49 of the Ohio Revised Code permits courts to rely on extrinsic sources only to resolve ambiguities in the text. *Eaton* remains good law because LSC analyses, or any extrinsic source, may not be used to override the plain meaning of text. The

⁹³See *id.* at 1125.

⁹⁴*State v. Smith*, 684 N.E.2d 668 (Ohio 1997).

⁹⁵See *id.* at 694.

⁹⁶*State v. Awkal*, 667 N.E.2d 960 (Ohio 1996).

⁹⁷*Id.* at 967.

⁹⁸*State v. D'Ambrosio*, 616 N.E.2d 909, 918 (Ohio 1993) (quoting *State v. Cotton*, 381 N.E.2d 190, 193 (1978)).

⁹⁹*Id.*

¹⁰⁰See *Citizens Ins. Co. of New Jersey v. Burkes*, 381 N.E.2d at 967 (citing the LSC Comment to OHIO REV. CODE ANN. § 2903.01). See also *D'Ambrosio*, 616 N.E.2d at 918, for another instance where the court used this LSC comment to define the requirements of a "scheme designed to implement the calculated decision to kill." *Id.*

danger is in reading *Eaton* as forbidding the use of LSC analysis to aid in any statutory interpretation.¹⁰¹

The record described by Gold demonstrates that there is and has been some type of legislative history maintained in Ohio and relied on by courts in Ohio since the mid-19th century. Even though many commentators assume that legislative history does not exist in Ohio, the Ohio Revised Code tells the courts they may rely on legislative history when construing an ambiguous statute. Based on the Ohio Revised Code, I conclude that legislative history in fact exists in Ohio and that Ohio courts have been using a particular type of source over the past seventeen years and calling it legislative history. I intend to explore possible reasons for these contradictions later, after describing Ohio's legislative process and particularly the Ohio Legislative Service Commission, the source of the documents relied upon by Ohio courts.¹⁰²

IV. OHIO LEGISLATIVE SERVICE COMMISSION

The Legislative Service Commission is a state agency created by statute in 1953 to provide technical and research services to the members of the General Assembly.¹⁰³ It is part of the legislative branch of Ohio government. "LSC staff are non-partisan researchers and bill drafters who play a supporting role in the legislative process" and are maintained "solely to give members of the General Assembly access to the technical assistance and research capabilities that will enable them to perform their duties efficiently and effectively."¹⁰⁴

The "Commission" itself is composed of fifteen members: seven legislators from the House, seven from the Senate, and a non-legislator Director of LSC staff who is employed by the legislator members. The members include the President of the Senate and six additional senators appointed by the President, the Speaker of the House, and six additional representatives appointed by the Speaker. In order to assure minority party representation, the statute provides that no more than four of the six appointed members of each house may come from the same party.¹⁰⁵ The Commission maintains the staff "solely to give members of the General Assembly access to the technical assistance and

¹⁰¹But see 85 O. Jur.3d, *Statutes* §§ 188, 216 (1988 & Supp. 1997), for an example of what I believe is a misuse of both *Eaton* and *Dickinson*; *Meeks* is entirely absent from Section 188 on legislative history and Section 216 on the use of reports of committees or commissions.

¹⁰²The use of the House and Senate Journals is outside the scope of this paper; I am focusing instead on the court's use of LSC documents as legislative history.

¹⁰³See GUIDEBOOK, *supra* note 35, at 86; see also OHIO REV. CODE ANN. §§ 103.11-13 (Anderson 1990) for creation of LSC, its powers and duties.

¹⁰⁴Memorandum from Bob Shapiro, LSC Director, to Members of the Ohio General Assembly and LSC Staff, on the role of LSC Staff (May 21, 1997) [hereinafter Memorandum from Bob Shapiro, LSC Director] (on file at LSC, to be incorporated into Staff Manual).

¹⁰⁵GUIDEBOOK, *supra* note 35, at 86-87.

research capabilities that will enable them to perform their duties efficiently and effectively."¹⁰⁶ LSC staff work with and complement House and Senate caucus staff.¹⁰⁷

A. History of LSC

LSC was established in 1953 as part of a consolidation of governmental research services under one single agency.¹⁰⁸ The Commission of Code Revision, formed in 1945 to codify and revise state law, recommended in its final report that a permanent non-political research authority be established to conduct research to draft legislative proposals during the interim between sessions.¹⁰⁹ The Legislative Reference Bureau (LRB), formed earlier, retained its responsibilities for bill and resolution drafting. LSC's primary duties included legislative study committees and long term research reports,¹¹⁰ short-term research on any subject, codification of the law of the state, and impartial information and reports.¹¹¹

In 1965, LSC began to accept individual member requests for bill drafts, install computerized bill typing systems, and emphasize session-related services. It also began, upon request, to provide staff for standing committees of the House and Senate in the next session.¹¹²

The 1966 elections, the first under the one-person one-vote single-member district system, brought in a large number of freshman legislators.¹¹³ Thereafter, the General Assembly, acting through the legislative leadership of

¹⁰⁶See Memorandum from Bob Shapiro, LSC Director, *supra* note 104.

¹⁰⁷See *id.* See also GUIDEBOOK, *supra* note 35, at 84 (describing partisan personal and caucus staff services; the House and Senate each have a majority and minority party caucus).

¹⁰⁸See DAVID A. JOHNSTON, THE OHIO LEGISLATIVE SERVICE COMMISSION—A NON-POLITICAL POLITICAL INSTITUTION 2 (1986) (reporting that The Ohio Program Commission, the Legislative Research Commission and the Bureau [sic] of Code Revision were merged into LSC) (on file with LSC).

¹⁰⁹See FINAL REPORT OF THE COMMISSION OF CODE REVISION 22 (House Journal, July 1, 1953).

¹¹⁰See GUIDEBOOK, *supra* note 35, at 87-88. Legislative study committees are a type of long-term research approved by the Commission and undertaken by a special committee of legislators. Other long-term research is done by LSC staff members either after approval by the Commission, or upon requirement by specific legislation.

¹¹¹See JOHNSTON, *supra* note 108, at 2.

¹¹²See *id.* at 14-15 (Johnston was not specific as to who asked the Commission to provide staff for committees, but all LSC staff work is in response to the General Assembly acting through the Commission).

¹¹³See Thomas A. Flinn, *The Ohio General Assembly: A Developmental Analysis*, in STATE LEGISLATIVE INNOVATION 233 (James A. Robinson ed., 1973) and Samuel C. Patterson, *Legislative Politics in Ohio*, in OHIO POLITICS 238 (Alexander P. Lamis ed., 1994).

the Commission, asked LSC staff to be present at every committee meeting.¹¹⁴ In 1967, the General Assembly moved toward an annual session approach. Annual sessions changed the focus of LSC staff. With no interim, in-depth interim studies faded away as demands for immediate staff work became more frequent.¹¹⁵

Staff size had increased in the late 1960s and throughout the 1970s because committee chairpersons "did not want staff assigned to their committees doubling up on some other committee."¹¹⁶ Committees increased in number as well, from 24 in 1967, to 38 in 1985. Staff at LSC increased from 34 in 1966 (including 20 professionals plus clerical staff) to 121 in 1985; LSC began with a staff of 7 in 1953.¹¹⁷ LSC employs a staff of over 100 today, including about 60 professionals with either law or other advanced degrees.

In 1981, during a low point in state finances, the General Assembly abolished the Legislative Reference Bureau. The legislature gave LSC the bill and resolution drafting duties formerly assigned to the bureau. In doing so, it saved money by eliminating the salary of the LRB director and one attorney.¹¹⁸ Prior to its elimination in 1981, the LRB had primary responsibility for bill drafting, while LSC had primary responsibility for long-term studies, and did some bill drafting. In addition, LSC would prepare, upon legislator request, implementing legislation that resulted from its own studies, and legislation for special sessions.¹¹⁹ In 1965, the Commission decided to accept individual member requests without taking formal action. "That session, LSC staff drafted about 800 bills. Meanwhile, the LRB was drafting 1300 bills."¹²⁰

In 1967 LSC placed into operation a computerized version of the code and bill preparation system, which increased the capacity to produce bills tenfold from 400 in 1963, to 4100 in a single session. David Johnston, primary chronicler of LSC history, does not believe the computerized bill typing was the only explanation for LSC's vast increase in the number of bills produced. He believes the continued presence and support of LSC staff in committees was another factor.¹²¹ According to Johnston, "members stopped drafting their own bills; many lobbyists and state agency officials asked for bills as concepts rather than handing legislators completely drafted bills to introduce; and legislators who

¹¹⁴See JOHNSTON, *supra* note 108.

¹¹⁵See *id.* at 15.

¹¹⁶*Id.* at 15-16.

¹¹⁷*Id.*

¹¹⁸*Id.* at 18. Frugality will emerge often as a prominent value in Ohio.

¹¹⁹JOHNSTON, *supra* note 108, at 31.

¹²⁰*Id.* at 34.

¹²¹*Id.* at 35. "Computerized bill typing permitted a great increase in substitute bills but the increases cannot be explained through that one factor. Indeed in the most recent sessions when the total number of substitute bills went up, Commission drafting loads went down." *Id.*

received drafted bills from agencies and interest groups for introduction asked LSC to go over them and redraft them as needed. These developments were furthered by House and Senate rules that required all bills introduced to be approved by the LSC or the LRB for form."¹²²

The elimination of LRB meant that all bill drafting was done by LSC, by drafters who sat in on and worked for the committees that heard the bills they drafted, allowing them to hear the questions and concerns raised concerning these bills.¹²³ This is still the practice today.¹²⁴

B. Bill Analyses

From its earliest days, members asked LSC to analyze certain bills and explain their content because of the "combinations of complex language, specialized word usage, and the broader legal context of bills. . . ."¹²⁵ The practice evolved gradually. First, the Senate President pro tem during the mid-1950s asked for analyses of the bills considered by the Senate Rules Committee. The analysis would explain how the bill changed the law, the purpose of the bill, and how the bill would deal with the problem. Then all Rules Committee members requested bill analyses.¹²⁶

In 1961, senators asked LSC to provide the analyses requested by the Rules Committee to all the senators before a vote on a bill in any floor session.¹²⁷ By 1961, staff was providing bill analyses upon request, but not routinely, for the House as well as the Senate; legislator feedback confirmed the value of this service.¹²⁸

LSC began to provide analyses to the House on a routine basis in 1967, rather than just by request, in response to a 1966 study of legislative services, where more than half of the House members indicated they wanted bill analyses. When staff were provided for each standing committee, chairs were given the option of having analyses done for their committees; all but House Judiciary wanted them. Since the beginning of the 1967 session, LSC has prepared bill analyses for both committee and floor use in both houses.¹²⁹

¹²²*Id.* at 35-36.

¹²³*Id.* at 37.

¹²⁴See GUIDEBOOK, *supra* note 35, at 86-92.

¹²⁵JOHNSTON, *supra* note 108, at 41.

¹²⁶*Id.* at 42.

¹²⁷*Id.* at 43.

¹²⁸See Minutes from the Ohio Legislative Service Commission (February 27, 1961) (recording a report by the Director that "the staff was doing bill analyses for the House as well as the Senate this Session" and that "it was the consensus that this is one of the most valuable services the staff can render during legislative sessions.") (on file with LSC).

¹²⁹JOHNSTON, *supra* note 108, at 43.

C. LSC Staff Today

Ohio's original approach to legislative staffing was different from other states, and it still is. More typical is division by function with separate agencies dedicated to drafting, code revision, research, library, and fiscal review.¹³⁰ LSC is a centralized staff agency; each professional staff member performs research, bill drafting, bill analysis, and committee staffing. Organization is by subject matter groups based on the committee structure of the legislature.¹³¹

The members of the General Assembly in Ohio have their own small partisan staff.¹³² Ohio employs a smaller total partisan and non-partisan legislative staff when compared to nearby states that have comparable population and also have full-time legislatures.¹³³

At least one LSC staff person is assigned to each standing committee and subcommittee of the House and Senate.¹³⁴ That person attends all committee meetings, so he or she is able to listen to testimony and debate, and become acquainted with the members of the committee. Bill drafting is done in this context of an ongoing relationship.¹³⁵ When a legislator wants to draft legislation, he discusses his ideas with LSC staff or gives drafts to LSC to review, and the LSC staff works with the legislator to put the ideas into language.¹³⁶

¹³⁰Telephone Interview with Brian Weberg, Principal Staff Associate in the Legislative Management Program, National Conference of State Legislatures (July 28, 1997).

¹³¹JOHNSTON, *supra* note 108, at 47-48.

¹³²See Patterson, *Legislative Politics in Ohio*, *supra* note 113, at 255. "For a legislature in an urban, industrial state, the Ohio House and Senate operate with relatively lean staffs." *Id.* See also GUIDEBOOK, *supra* note 35, at 84-86 (listing the caucus and personal staff available). "Caucus and personal staff include caucus aides, legislative aides, administrative aides, secretaries, legislative interns, and pages." *Id.* Both chambers have a minority and majority party caucus. "The majority party in each house normally controls how funds appropriated for the operation of the particular house are allocated . . . including the number of staff available to members." *Id.* See, e.g., the telephone listing of the House staff for the 122nd General Assembly. Each Republican representative has an administrative assistant and a legislative assistant. Each Democrat has one assistant listed. The Senate's telephone listing lists almost twice as many Republican aides (twenty-nine) as Democratic aides (sixteen).

¹³³Telephone interview with Brian Weberg, *supra* note 130. Pennsylvania and New York, for example, have central agencies, but they are more removed from the legislative process; total staff in New York is 5000 and in Pennsylvania 2700. Most of these are partisan staff. Ohio, in contrast, is considered to be a large state with a full time legislature that "reins in size of staff," according to Weberg. Staff size in Ohio is under 500. *Id.*

¹³⁴See GUIDEBOOK *supra* note 35, at 87.

¹³⁵See *id.* at 90-92.

¹³⁶See *id.* at 46, section titled "From Idea to Bill."

LSC staff do not make or advocate policy; they listen to the members and help them put their policy intention into words.¹³⁷ The members also listen to lobbyists and to their party caucus.¹³⁸ LSC staff are answerable only to the members, not to the lobbyists, when drafting a bill, unless and only if instructed by the member to work with the lobbyist.¹³⁹ The LSC staff are agents of the institution, the General Assembly, because they serve at the pleasure of the General Assembly.¹⁴⁰ However, when drafting a bill, they act as the agent of the individual member. Their role depends upon their ability to be trusted as neutral and non-partisan. "Non-partisan" in Ohio means researching and teaching, providing information, and laying out options, rather than advocating one position over another. It means putting political intentions into technical language, because technical revisions do not involve taking sides.¹⁴¹

The members can turn to lobbyists or members of their party for political instruction, but they turn to LSC for technical assistance in research, drafting, factual interpretation of the meaning of words, how a bill fits into current law and how it will change current law.¹⁴² Thus, the legislators use different sources for technical and for political information. The assistance of non-partisan staff does not deprive legislators of political staff or make the legislative process non-political; instead, it makes the acquisition of facts non-political.¹⁴³

¹³⁷See *id.*

¹³⁸See Patterson, *Legislative Politics in Ohio*, *supra* note 113, at 24, "party caucuses are the routine site for discussing and hashing out party stands, for the exchange of information between leaders and backbenchers. . . .," and at 256 n.28 (citing Barbara Bolt Lewis, Ohio Lobbying 1992 (Ph.D. dissertation Ohio State University), "lobbying by interest groups is very much in evidence in the capital," but the leadership "constrains and channels interest group influence."

¹³⁹See GUIDEBOOK, *supra* note 35, at 90-92 (describing lobbyist drafting as an occasional, not regular, occurrence).

¹⁴⁰See Memorandum from Bob Shapiro, LSC Director, *supra* note 104.

¹⁴¹For a discussion of non-partisan staff in Congress, as well as a comparison of partisan and non-partisan staff in general, see MICHAEL MALBIN, UNELECTED REPRESENTATIVES 170, 172, 177, 184, 186 (1980) (describing the non-partisan staff who served the Joint Committee on Internal Revenue Taxation from 1964-1976 and 1977-78). *Id.* at 187-201, (describing a different kind of "non-partisan staff that has policy preferences, operates from certain assumptions and makes policy recommendations based on those assumptions"); see *id.* at 202, (explaining that when staff use debatable assumptions to make judgments that have policy implications, it is more difficult to maintain a non-partisan posture). LSC staff avoid policy recommendations. See Memorandum from Bob Shapiro, LSC Director, *supra* note 104.

¹⁴²Interview with Bill Heaphy, Research Attorney, LSC, in Columbus, Ohio (July 17, 1997).

¹⁴³See MALBIN, *supra* note 141, at 242-43 (commenting on the advantages of dual staff). "If every committee [in Congress] had a nonpartisan professional staff core, there would be fewer occasions on which Congress would receive intentionally partial or distorted information from its staff . . . Let every committee have a dual staff. . . ."); see also JOHNSTON, *supra* note 108, at 8, 64 where he attributes the acceptance of LSC to both the

Once a bill is drafted, and before the first committee hearing, the LSC staff person writes a bill analysis, which is distributed to committee members while the bill is in committee, updated to reflect amendments made while in committee, and distributed to everyone else when it leaves committee to be voted on in the House or Senate. When the bill moves to the second chamber, another LSC staff person, assigned to the committee in that chamber, reads the bill and writes another bill analysis, which may be different. The staffer in the second chamber will always give the bill a fresh look even if there are no changes, and at minimum write a new bill analysis with new title and history. The staffer in the second chamber is usually responsible for the final bill analysis after a bill is enacted, so the person who writes that final analysis is not the same person who helped draft the bill. Occasionally, with long complex bills, the analysis is a cooperative effort by more than one staff member.¹⁴⁴ The bill analysis will focus solely on the text as it is and what that text means, how it affects existing law, and what the repercussions of that particular text will be.¹⁴⁵ It is usually more than a mere restatement of what the bill says.¹⁴⁶

The process of preparing bill analyses is less interactive than actual bill drafting. When bills are drafted, regular dialogue occurs between the sponsor and LSC. It is the sponsor who has the final word about what the bill as introduced will say. Political considerations will be a factor. The LSC staffer is there to help implement those choices in drafting, but the legislator is the lawmaker. By contrast, LSC staff preparing bill analyses work on their own with review by their division chiefs. If it is obvious that what the text says is not what the sponsor intended, the staffer will call the sponsor to tell him or her about the problem and what the bill analysis will say. The bill analysis of that version does not change, however. The function of the bill analysis is to tell the member what the text as written at that point will do, not what the member wants the bill to do, something that has already been discussed between LSC and the legislator. For various reasons, language planned by the

service it provides and its coexistence with partisan caucus staff.

¹⁴⁴When the bill moves to the second chamber, usually another LSC staff person writes an analysis, and each staff person's work is reviewed by a division chief and later by the Director. Telephone Interview with Dennis Papp, LSC Research Attorney (March 4, 1998).

¹⁴⁵See LSC STAFF MANUAL, *Bill Analysis*, 8 (warning of the pitfalls of believing a bill "does or does only what its stated intent is." Instructing that sometimes a bill does not do what it is intended to do; or "it does what it is intended and has other significant implications.")

¹⁴⁶See *id.* at 4-5 (for instructions about how to write a bill analysis). A bill analysis should not be just a "bland regurgitation of the bill's contents . . ." or "merely recite the things the bill does in the order in which the bill does them." The bill analysis "[f]requently . . . must go beyond the language of the bill to an explanation of present law or a discussion of a given situation in order to provide adequate understanding of what a bill does or attempts to do." *Id.* But see MELANIE K. PUTNAM & SUSAN M. SCHAEFGEN, OHIO LEGAL RESEARCH GUIDE 96 (1997). "The purpose of the bill analyses is to summarize the bill for the legislator."

legislator can result in unintended consequences, and the point of the analysis is to help the legislator ultimately end up with text that is likely to accomplish his purpose. Thus, if there is a problem with the bill, the legislator and LSC staff may write an amended version. Different bill analyses for each version highlight and analyze the effect of even small changes in the text, and also highlight the intent to make those changes.¹⁴⁷

Because a new bill analysis is written for each version of a bill, members can compare versions for changes and for the implications of the changes.¹⁴⁸ A different type of bill analysis, called the synopsis, is particularly useful for comparing the effects of substitute bills, amendments, and conference committee recommendations.¹⁴⁹ Legislators rely on their partisan and non-partisan sources in different ways: they rely on the LSC bill analysis to understand the content of a bill, and on their party caucus for their political and policy decision-making.¹⁵⁰

There is empirical support for the proposition that both legislators and staff read and rely upon bill analyses.¹⁵¹ A recent Document Survey conducted by LSC of legislators and staff asked how often bill analyses were used to 1) learn the details of a bill; 2) obtain an overview of a bill; 3) learn how a bill affects existing law; 4) find the location of a specific provision in a bill; and, 5) find out if a bill has potential problems. Of 144 responding, 135 replied that they frequently used bill analyses to get an overview of a bill; 119 replied that they frequently used bill analyses to learn the details of the bill; 72 replied that they frequently used bill analyses to learn how a bill affects existing law; and 43 replied that they frequently used bill analyses to find out if a bill has potential problems.¹⁵² Individual comments from legislators included, "I am extremely

¹⁴⁷Interview with Dennis Papp, LSC Research Attorney, in Columbus, Ohio (September 18, 1997); interview with Shelagh Baker, LSC Division Chief, in Columbus, Ohio (September 11, 1997).

¹⁴⁸Telephone interview with Dennis Papp, *supra* note 144.

¹⁴⁹Interview with Bill Heaphy, *supra* note 142, (relating that, in his experience, legislators use comparative synopsis to make sure something has not been "slipped in.") Synopses are required by House Rules 36 and 63.

¹⁵⁰*See id.*

¹⁵¹*See* LSC STAFF MANUAL, *supra* note 145, at 13 (emphasizing the continuing importance of bill analysis for legislators, and thus the importance of LSC staff effort in this area.)

¹⁵²*See* Report to the Director, Document Review Committee Survey of Legislators and Staff (Oct. 1996) (on file at LSC). The committee mailed surveys to 340 legislators and staff, including aides, caucus staff, and administrative assistants of House members who did not have legislative aides. They received responses from 27 Representatives, 6 Senators, 65 House staffers, and 46 Senate staffers, for a total of 144 responses. Respondents were given three choices of response: frequently, sometimes, and rarely. The committee was established to "review and critique the major documents the LSC staff prepares for the General Assembly" and questioned members and their staff to determine usefulness of and solicit suggestions for the improvement of bill analyses, comparative synopses, the digest of enactments, and other documents. *Id.* I am limiting

dependent upon them;" "It is always helpful to have a section boiled down, [sic] essential thrust of the main operation of the bill."¹⁵³ Individual comments from staff included, "All analysis [sic] are helpful because it is much more difficult to read the actual bill;" "There is hardly a day that goes by that I do not use a bill analysis for one reason or another. Sometimes it is for bringing myself up to speed on an issue or for giving a constituent an easy-to-understand version;" "Only when an analysis has not yet been drafted do I begin the tedious job of reading the entire bill and preparing my own synopsis for a clearer understanding."¹⁵⁴

The record provided by the history of LSC, the minutes of a 1961 Commission meeting, the requests for more of this type of service over the passage of time, and the results of the most recent survey all indicate that bill analyses are a valuable resource for legislators. Given that legislators and their personal aides read bill analyses for both an overview and the details of a bill, the bill analysis appears to be something on which the legislators rely upon before they vote. That reliance comes close to representing something about the shared intent of the legislature, which is a key factor in legislative history reliability for courts according to commentators who write about federal legislative history.¹⁵⁵ If the majority of legislators do read bill analyses before voting, then that practice gives insights into what assumptions were made by legislators about how their words would be understood and the setting in

my discussion to the results of questions about bill analyses. According to the chairman of the Document Review Committee, everyone who responded to the questionnaire filled out the multiple choice portion. The responses to the multiple choice questions followed a strong pattern. The committee did not break down the results to distinguish between staff and legislator response. Not all respondents provided individual comments, though, so the committee found the breakdown of comments between members and staff to be more interesting and useful. Telephone interview with Jim Kelly, LSC Research Associate (June 3, 1998).

¹⁵³See generally Report to the Director, *supra* note 152 (These comments from legislators and from staff were in response to LSC requests for suggestions for improvement); see also LSC Staff Memo, Document Review Committee Adopted Recommendations, January 8, 1997, ("dramatic fundamental changes to LSC documents were not warranted but the documents could be made more useful to legislators and their staff. . . . All in all, the revisions are changes in packaging, rather than content.")

¹⁵⁴Report to the Director, *supra* note 152.

¹⁵⁵See, e.g., James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?* 93 MICH. L. REV. 1, 74-75 (1994) (describing how members of Congress examine and rely upon a committee report for information about a bill's content and its expected consequences before they vote, because the committee has been given responsibility for drafting the text and explaining its meaning, . . . "not because each member has agreed to it in the way a member 'agrees to' text through a vote."; see also Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863-65 (1991) (defending the idea that a group purpose or intent can be ascribed to group action by giving common-sense examples from everyday life where society does ascribe a group intent, despite the possibility of slightly varying motives for each individual in the group making the decision).

which they made these assumptions.¹⁵⁶ I will not indulge in philosophical debate as to whether collective intent exists; I am assuming for the purposes of this paper that it exists and can be found. One practical reason to do so is that the Ohio Revised Code allows courts to look for legislative intent when the language of a statute is ambiguous.¹⁵⁷

V. A COMPARISON OF FEDERAL AND OHIO LEGISLATIVE HISTORY

A. *What is Legislative History?*

Even those involved in Ohio legislative process might say that Ohio has no legislative history, because they define legislative history as what Congress creates, i.e., a verbatim record carefully indexed and kept in volumes in law libraries everywhere. Many observers seem to think that if a state keeps a record similar to that of Congress, it has legislative history, and if it does not, it simply has no legislative history. I want to sift through the actual ingredients of legislative history at the federal level; look at precisely which ingredients courts rely upon and why; then look again at Ohio legislative history and compare.

At its simplest, legislative history is the circumstances of the creation of the statute.¹⁵⁸ A more narrow definition is the institutional progress of a bill to enactment. At its most detailed, it is a complete record of every word of debate and testimony ever spoken or written about a bill.¹⁵⁹

Courts value legislative history for the insight it provides about the intent of the legislators, or the mischief at which the text is aimed.¹⁶⁰ This is particularly so when the language of the statute is ambiguous or incomplete, although courts also use legislative history to confirm the plain meaning of the text.¹⁶¹ Congress produces a vast quantity of legislative history, but not all of it is con-

¹⁵⁶See *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989) (describing how legislative history can also help those who prefer the "plain meaning" approach to statutory interpretation. Judge Easterbrook distinguishes different uses of legislative history and comments that "[t]o decode words one must frequently reconstruct the legal and political culture of the drafters. Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood.").

¹⁵⁷See OHIO REV. CODE ANN., *supra* note 26, § 1.49.

¹⁵⁸WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *LEGISLATION* 733 (1995).

¹⁵⁹See OTTO HETZEL ET AL., *LEGISLATIVE LAW AND PROCESS* 438 (2d ed. 1993) (*cited in* ESKRIDGE & FRICKEY, *supra* note 158, at 733 n.1 (providing a checklist of all the materials that will constitute the legislative history of a law; number 11 of the list is analysis of bill by legislative counsel).

¹⁶⁰See Eskridge & Frickey, *supra* note 51, at 356 (The most authoritative historical evidence is the legislative history of the statute, because it is a contemporary record made by the enacting legislators).

¹⁶¹See Brudney, *supra* note 155, at 42-43 & n.172.

sidered equally reliable for this purpose.¹⁶² There are problems of manipulation, and there is skepticism that collective intent can ever be determined.¹⁶³ When federal courts do rely on legislative history, their first choice for an authoritative source is usually the committee report. Committee reports are accessible, describe the problems the proposed legislation is meant to resolve and the solutions offered by the bill, and contain a "section by section summary of the provisions of the bill."¹⁶⁴

Another reason courts use committee reports as legislative history is because the committee report is relied upon by those not on the committee to tell them what the purpose of the bill is and what the bill will accomplish. The other members will trust the committee report's contents because they trust its authors.¹⁶⁵ When a court is interpreting a federal statute it is trying to determine what Congress intended, and if the text does not provide the answer, it seeks evidence of what Congress intended in a document relied upon by those who voted on the bill. The committee report is the relied-upon document.¹⁶⁶ Thus it is considered to be the most reliable form of legislative history, because it represents a shared understanding reached by Congress as a body.¹⁶⁷

There are many other forms of federal legislative history: floor debates, hearings, statements by sponsors or drafters, post-enactment legislative history, and legislative inaction.¹⁶⁸ But reliability diminishes as possibilities for manipulation increase. Further, some federal judges do not consider any legislative history reliable because they do not believe in the concept of "collective intent" and are concerned about manipulation of records of history.¹⁶⁹

¹⁶²See *id.* at 47-48, 56, 75-76. Legislative history is not voted upon, much of it is produced by staff who are not elected, and members may at times insert statements in the record for the purpose of swaying a court. This does not mean that legislative history should be disregarded, but it does suggest that reliability of types of history in general, and "key elements" of particular pieces of any history, need to be evaluated.

¹⁶³See *id.* at 5. See also Breyer, *supra* note 155, at 863-66 for a defense of belief in group intent as a reasonable concept.

¹⁶⁴See ESKRIDGE & FRICKEY, *supra* note 158, at 743. The authors recognize that in state legislatures, committee reports take on different forms, one of which is a staff analysis of a pending bill. *Id.* at 744.

¹⁶⁵See Brudney, *supra* note 155, at 74-75 & n.298.

¹⁶⁶See *id.*

¹⁶⁷See *id.* at 27-29 (describing how members of Congress use committee reports); ("reliability attaches mainly because the history is a product of legislative mechanisms that the generality of members embraced"). *Id.* at 70.

¹⁶⁸See generally ESKRIDGE & FRICKEY, *supra* note 158, at 733-832.

¹⁶⁹*Id.* at 749. See also Brudney, *supra* note 155, at 48-49.

Actual committee minutes or reports in Ohio are not uniform in content, style, production, or use.¹⁷⁰ Bill analyses are fairly uniform, however, and I have shown that members of the Ohio General Assembly rely on bill analyses for an accurate neutral explanation of what the bill will accomplish.¹⁷¹ If a committee report is the single most important item of federal legislative history, then it is interesting to compare its elements with the elements of the LSC bill analysis.¹⁷²

A committee report may contain "a description of the bill's purpose and scope, a statement of the reasons it should be enacted, a section-by-section analysis, a report on changes the bill would make in existing law, committee amendments, communications for the executive branch, if any, minority reports if any, and various other items."¹⁷³

An LSC bill analysis will describe the historical, social or legal background that gave rise to the bill, the scope of the changes it will make in existing law and the likely effect of those changes, and contain a section by section analysis. The bill analysis will not take an advocacy position as to why the bill should be enacted.¹⁷⁴ It will instead describe the effect of the bill and reasons for enacting the bill. If the text as drafted does not accomplish the specific detailed purpose the sponsor had in mind, the analysis by its very nature will inform the sponsor, and the sponsor can amend the bill so that it is more likely to

¹⁷⁰See PUTNAM & SCHAEFGEN, *supra* note 146, at 91. "Unlike federal legislative history, hearings, testimony, debate and committee reports are not typically available. . . ." *Id.* See also Interview with Debbie Tavenner, *supra* note 38 (reporting that records of testimony are randomly, rather than consistently, available).

¹⁷¹See Report to the Director, *supra* note 152.

¹⁷²The context of the bill drafting process in Ohio is text-centered, as I have described in part IV-C, LSC Staff Today, *infra*. Thus, legislative history is not expected to fill in gaps or answer questions left unanswered because of careless drafting. The differences in the content and quantity of legislative history in Ohio and Washington exist because of the differences in context—less legislative history is needed. Professional drafters are employed in order to avoid as much as possible the problems caused by careless drafting errors. Nevertheless, bill analyses contain remarkable similarities to committee reports. What is missing from bill analysis, compared to committee reports, may not be needed in Ohio. For example, elaborate purpose statements are not employed in Ohio on a regular basis; purpose is to be inferred from the operative provisions. See LSC BILL DRAFTING MANUAL IV-11 (1993). Executive agencies employ legislative liaisons to attend committee, and agency rules come back to LSC for code revision before they are codified into rules. See GUIDEBOOK, *supra* note 35, at 103-06.

¹⁷³See CHRISTINA L. KUNZ ET. AL., THE PROCESS OF LEGAL RESEARCH 282 (1992).

¹⁷⁴See LSC STAFF MANUAL, *supra* note 145, at 1 (reminding staff that the General Assembly wanted to make accurate and objective information available to members through the bill analysis) and 13 (describing when section-by-section analyses are useful, such as for longer bills, but cautioning that this technique alone will not provide an explanation of the bill). See also Telephone Interview with Dennis Papp, LSC Research Attorney (May 11, 1998) (distinguishing an analysis of all the sections of a bill from a section-by-section analysis).

accomplish the intended purpose.¹⁷⁵ If the bill intends to change the law in response to a judicial decision, the bill analysis will say so.¹⁷⁶

Each bill analysis for subsequent versions of a bill will describe changes in the bill and the effects of those changes on the bill and on existing law. The comparative synopsis, a format that compares amendments or substitute bills, also highlights and compares the effect of each proposed change.¹⁷⁷ A comparison of the versions of bills and their analyses will provide insight into what happened at each stage of the legislative process. The final bill analysis of the enacted bill will explain the effect of any floor amendments added in the second chamber or in conference committee.¹⁷⁸

Thus, bill analyses contain many of the valuable ingredients found in federal committee reports, such as information about the bill's purpose and scope, a section-by-section analysis, the changes it will make in existing law, and amendments to the bill as introduced. Moreover, bill analyses lack some of the liabilities of federal legislative history. They are written by non-partisan drafters, they are based on the text alone, and they are not subject to the manipulation of political forces. Although a bill analysis will not describe a purpose that is at odds with a poorly drafted text, it will accent and emphasize the intent of text to change the law, or aid in construing intent of text that is ambiguous despite careful drafting. There is less legislative history in Ohio, but what there is, is "choice."¹⁷⁹ Ohio courts during the past 18 years have increasingly used these bill analyses, either to assure themselves that they have understood the intent of the legislature when interpreting a new statute, or to understand an ambiguous statute.¹⁸⁰

¹⁷⁵Typically, the purpose will have been established through a dialogue between legislator and LSC staff prior to and during bill drafting.

¹⁷⁶*See, e.g.*, bill analysis for S.R. 98, 122nd Gen. Assembly (Ohio 1997), which explained that the bill provided that a court could *not* dismiss criminal charges when the only reason for dismissal was the request of the complaining witness and the prosecutor objected to the dismissal (emphasis added). This was a change in the law in reaction to the Ohio Supreme Court.

¹⁷⁷*See* GUIDEBOOK, *supra* note 35, at 56.

¹⁷⁸*See id.* at 57. The inclusion of floor amendments in the final analysis could be compared, in legislative history value, to the record of colloquies in Congress.

¹⁷⁹As a point of comparison, I am inspired by Spencer Tracy's remarks in the movie *PAT AND MIKE* (Metro Goldwyn-Mayer 1952) about Katherine Hepburn's slight figure compared to her athletic ability. Mike said "she may not have much meat on her but what she has is cherce (sic)." *Id.* Ohio does not have the quantity of legislative history that Congress produces, but what Ohio does have is useful, reliable, and efficiently produced. Mike admired Pat's figure, and I admire what Ohio has managed to do with its leaner resources.

¹⁸⁰*See infra* Part III.

Ultimately it is the legislature and the courts that decide what legislative history is and which kind is reliable.¹⁸¹ Ohio emphasizes textual accuracy in its approach to drafting in a number of ways. Those who work for LSC believe that with careful attention to detail and to the wishes of the legislator, accurate text is achievable.¹⁸² Although LSC staff are not the only ones who draft, because some legislators do their own drafting, the technical services staff will still review their text for technical elements.¹⁸³ LSC staff provide bill analyses for the legislators as a method of checking if the text accomplishes its purpose; if it does not, amendments are likely to follow. These bill analyses are available for the entire General Assembly and their staff to read.¹⁸⁴ This approach may actually work well enough that problems of interpretation do not come up as frequently as they do with federal law. By contrast, drafting in Congress is more fractured and corrections in process are difficult.¹⁸⁵

But interpretive problems still do arise in Ohio, even if infrequently, and section 1.49 of the Ohio Revised Code allows the courts to use extrinsic sources in those instances. In Ohio, commentators and some lawyers have been slow to notice this. In the next part, I will speculate about possible reasons. If attorneys are not aware of what is available, is it because the evidence is hidden, or is it because many attorneys are concrete thinkers and conceive of "legislative history" as "federal legislative history" only?

B. Political Culture, Legislative Process, and Legislative History

Washington, D.C., and Columbus, Ohio, are culturally different. If these two cities also have different political cultures with different political habits and personality, style and values, the Ohio legislature and legislative process should not be a carbon copy of Congress. The differences in political history, habits and traditions, which reflect the values of the state's residents, have an impact on the types of institutions a state adopts.¹⁸⁶

¹⁸¹Cf., Shirley S. Abrahamson and Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1049 (1991) (The authors make an assumption that "state judges and state legislators appear to influence each other in the common enterprise of interpreting, applying and improving statutes," before they analyze how judges interact with legislators through opinions, and how legislators then communicate with courts). *Id.* at 1050.

¹⁸²I base this observation on my interviews and interactions with LSC staff. This belief seems implicit, as well, in the length and detail of the instructions in the LSC BILL DRAFTING MANUAL, the procedures of the code revision staff, and the proofreading by the bill preparation staff, as described in the GUIDEBOOK at pp. 91-92.

¹⁸³See GUIDEBOOK, *supra* note 35, at 91.

¹⁸⁴See *supra* Part IV, B.

¹⁸⁵See, e.g., ESKRIDGE & FRICKEY, *supra* note 158, at 757-58.

¹⁸⁶ALAN ROSENTHAL, LEGISLATIVE LIFE: PEOPLE, PROCESS AND PERFORMANCE IN THE STATES 111 (1981) [hereinafter LEGISLATIVE LIFE]. "Legislatures are interwoven in the fabric of their states; and the legislative process cannot be considered in isolation from the prevailing ethos, the political ethics, and the capital community of the state in which

"Political culture" describes "the political habits built up by a group of people and transmitted from one generation to another;" it is the "personality structure" of the state.¹⁸⁷ This concept can be useful even though there is no single standard about how to measure or classify the culture.¹⁸⁸ The concept of political culture "sensitizes us to the distinctive and persistent qualities of each state—its styles of politics, the orientation of its citizens, and the heterogeneity within the state itself." Each state is assumed to have a unique political culture.¹⁸⁹

What exactly is different about political culture in Ohio? Ohio is fundamentally conservative.¹⁹⁰ It is a diverse state, geographically, ethnically, and economically, but its diversity has complex effects and seems to lead to resistance to change. Ohio voters are particularly conservative, as evidenced by patterns of gubernatorial elections throughout Ohio history. The state's history of choosing governors follows a pattern of electing candidates who promise to trim the budget, alternating with periodic but short terms by candidates who try to raise taxes and restore state services, who are then ousted from office by another candidate promising to trim spending. Ohio remains low in support for funding of state services.¹⁹¹

Ohio's policy choices are cautious because even though the political parties are strong, they are nearly equal in numbers and power, so that state-wide solutions must be a compromise between competing partisan groups. The large number of cities in Ohio makes it difficult for one city to dominate the state; without one dominant party or city or region, leaders must seek compromise

it operates." *Id.*

¹⁸⁷*Id.* at 112.

¹⁸⁸DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 93-126 (2d ed. 1984), cited in *LEGISLATIVE LIFE*, *supra* note 186, at 113-14, n.3. Elazar uses a formulation to measure state political cultures. Elazar measures state culture on the basis of citizen orientation as individualistic, moralistic and traditionalistic. Ohio has an individualistic culture, which means that government's role is limited and politics is for the professionals. *See id.*

¹⁸⁹*LEGISLATIVE LIFE*, *supra* note 186, at 112 (comparing the states in style, attitudes towards political participation and the role of government, using Daniel Elazar's formulation of state political cultures).

¹⁹⁰JOHN H. FENTON, *MIDWEST POLITICS* 153 (1966), cited in ALAN ROSENTHAL, *STAFFING THE OHIO LEGISLATURE* 2 (1972) and John J. Gargan & Alexander P. Lamis, *Bibliographical Essay*, in *OHIO POLITICS* 380 (Alexander P. Lamis ed., 1994). Fenton described "persistent conservative cultural patterns" in Ohio and was the first to describe Ohio politics as "issueless." Fenton found "a legacy of potent historical events mixed with persistent conservative cultural patterns reinforced by pervasive lack of information salient to the working man or woman." Gargan & Lamis, *supra*. Rosenthal quoted Fenton, describing Ohio, as dedicated to the "virtues of honesty, thrift, steadiness, and caution" and observed that this dedication continues, which makes radical change to existing patterns quite difficult. ROSENTHAL, *supra*.

¹⁹¹*See generally* George W. Knepper, *Ohio Politics: A Historical Perspective*, in *OHIO POLITICS*, *supra* note 190, at 10-11, 15.

solutions. Candidates seeking statewide office must water down ideology to appeal to both ends of the political spectrum. Even though partisan identification by legislators and voters is strong in Ohio, it tends to be issueless and detached from consistent policy differences.¹⁹² The compromises tend to result in conservative choices. One choice that has been persistently popular in Ohio history is cutting taxes.¹⁹³ This leads those in elected office to believe that economy and frugality is very important to voters.

How do these characteristics of political culture affect the Ohio legislative process? An exhaustive list is beyond the scope of this paper, but staffing in Ohio is a pertinent example.¹⁹⁴ Non-partisan staff is less costly to maintain than partisan staff because, as common sense dictates, you don't need two of every type of staff person, and therefore can function with a smaller legislative staff.¹⁹⁵ Non-partisan staff produce a different type of report as legislative history: neutral. If the neutral reports are accepted as accurate by both parties, a smaller quantity of reports will be necessary.¹⁹⁶ In addition, the Ohio

¹⁹²See *id.* See also Patterson, *supra* note 113; ROSENTHAL, *supra* note 190.

¹⁹³See generally Knepper, *supra* note 191.

¹⁹⁴See, e.g., Alan P. Balutis, *Legislative Staffing: A View from the States*, in LEGISLATIVE STAFFING: A COMPARATIVE PERSPECTIVE 106 (James J. Heaphey & Alan P. Balutis eds., 1975) ("[S]taffing as a factor in the process of legislation has been, until fairly recently, almost completely ignored by political scientists . . . to the extent that professional staff has been a subject of study, the utility of this research for students of legislatures has been limited by a major perceptual bias . . . [l]egislative scholars have seemed to believe that Congress, and Congress alone, is worthy of study."); ROSENTHAL, *supra* note 190, at 2 ("The development of professional staffing in Ohio must be rooted in this state's experience and this legislature's structure"); Susan Webb Hammond, *Legislative Staffs*, in THE HANDBOOK OF LEGISLATIVE RESEARCH (Gerhard Loewenberg, et al. eds., 1985) (explaining the history, development and importance of research on legislative staffing in general).

¹⁹⁵See ROSENTHAL, *supra* note 190, at 2 (observing that the Ohio legislators he interviewed "expressed a devotion to economy and a concern about wastefulness and abuse. Legislators demand no more professional staff than is absolutely necessary to help them accomplish their job." See also JOHNSTON, *supra* note 108, at 64 (observing that Ohio has a "thrift ethic." "When a significant service can be provided at relatively low cost its legislators will buy it. The alternative method of staffing with each house having its own research, committee, and in some instances, bill drafting staffs, is inherently inefficient.")

¹⁹⁶Compare Balutis, *supra* note 194, at 13 (describing a hypotheses that different kinds of staff have different effects, although the evidence is "sketchy and impresionistic," and it is possible that different kinds of arrangements may affect the balance of powers in the legislatures) and JOHNSTON, *supra* note 108, at 64-65 (suggesting that LSC works in Ohio because "the members of the Commission are the legislative leaders. They control it . . . it makes them feel more at ease with having a non-partisan staff. The LSC does not represent an alternate source of power nor will it try to be one . . . and . . . it keeps their members satisfied. Without it leaders would face a variety of demands for staff services, especially for committee staff but also for additional aides to individual members. The present system is one in which a high degree of continuity is maintained and leaders do not have to contend with committee chairmen over how much staff support they can

legislature has not seen fit to transcribe its every word,¹⁹⁷ perhaps because legislative history costs money to store and preserve.¹⁹⁸

The rules for public record keeping in Ohio also reflect Ohio frugality. Public record keeping in Ohio is governed by section 149.333 of the Ohio Revised Code, which requires only that state agencies submit a plan for retention and/or destruction of records to a state records administrator for approval.¹⁹⁹ Decisions about record keeping are ultimately made for LSC, like all other state agencies, by a state records administrator and a state auditor.²⁰⁰ Fiscal considerations play a role in their decision; an example of a fiscal consideration is the expense of using available space for records. LSC is forced to make record-keeping decisions based on the space made available to it by the state, and the state auditor approves the plan.²⁰¹ The General Assembly has not legislated any different plan for LSC records. The state does not seem to want to use inordinate amounts of space and money to retain records.

In contrast, there are a number of reasons why the use of partisan staff can cause an increase in total number of staff. If one house has its own staff, the other house will want its own staff, and the total staff size will double. If one party has its own staff, the other party will also need complementary staff of its own, and staff size will be doubled. Partisan staff inevitably means either larger numbers of staff or resentment by the house or party without the numbers. As staff size increases, staff members create a power structure of their own and can even create distance between the legislators and constituents and lobbyists. As staff size increases, eventually the work increases as well, for the

have and who their staff should be").

¹⁹⁷House and Senate sessions have been videotaped by a small cable company since the statehouse restoration. There is no plan yet for cataloging or transcribing the tapes. Interview with Renee Jensen, Operations Manager of Ohio Government Telecommunications, in Columbus, Ohio (July 29, 1997).

¹⁹⁸See generally, *National Archives Running Out of Room*, THE CINCINNATI ENQUIRER, Mar. 25, 1998, at A02, available in 1998 WL3762866 (describing how the National Archives is running out of storage space, necessitating a new facility that may also run out of space. The Archives head, John Carlin, is seeking \$230 million for the fiscal year, an increase of 12% over this year.

¹⁹⁹OHIO REV. CODE ANN. § 149.333 (Anderson 1990). "No state agency shall retain, destroy, or otherwise transfer its state records in violation of this section . . . Each state agency shall submit to the state records administrator all applications for records disposal or transfer and all schedules of records retention and destruction. The state records administrator shall review such applications and schedules and provide written approval, rejection, or modification of the application or schedule. . . ." The decision of this administrator to approve or reject the plan will be "based upon the continuing administrative and *fiscal value* of the state records to the state or to its citizens . . ." (emphasis added).

²⁰⁰Interview with Debbie Tavenner, *supra* note 38.

²⁰¹*Id.*

legislator and the staff. Staff become entrepreneurial with agendas of its own, seeking new innovative ideas that lead to more work for more staff.²⁰²

Partisan staff is a choice and is not necessarily inevitable; once the choice is made, it is difficult to turn back. A perspective informed only by Congressional experience might assume that either non-partisan staff is impossible or that partisan staff is preferable because that is how things are done in Washington. Even Washington once tried to maintain a non-partisan staff, and certain committees continued to rely on non-partisan staff through the 1970s.²⁰³ Ohio demonstrates that non-partisan and partisan staff can work together in the legislative process because each meets different needs.²⁰⁴ States save money by using non-partisan staff for information and technical support, and saving money has historically been important to Ohio voters.

The partisan but issueless attitude that often characterizes Ohio legislators may be another reason non-partisan staff is accepted here. Researchers have found in both recent and in earlier studies of legislators an odd mix of strong party identification without ideology or issue-orientation.²⁰⁵ Perhaps because particular issues are not charged with party identity it is easier for Ohio legislators to turn to neutral researchers for objective facts when drafting bills. After the facts are available, the political decisions are made. The fact-finding process itself may not be political because the issues are not perceived as political.

There is a "Washington bias" in research and commentary on state legislatures.²⁰⁶ Because each of the fifty states has a different political culture, generalities about political process in "the states" are unwise. I have discussed staffing differences; the states are different from each other in many other ways which I will not explore in depth. For example, some have part-time "citizen" legislatures who serve without pay and some have full-time "professional" legislatures. The Ohio General Assembly is now considered full-time, but many members have second full-time careers, so that even the word "full-time" does not mean the same in every state.²⁰⁷ Also, a number of states have term limits, including Ohio, while many others do not. With respect for the staff support for these legislators, some states have one central agency, others have multiple

²⁰²See MALBIN, *supra* note 141, at 163-65, 248-49 (describing these occurrences in Congress).

²⁰³*Id.* (briefly describing non-partisan staff in Congress). See generally HARRISON W. FOX, JR. & SUSAN WEBB HAMMOND, CONGRESSIONAL STAFFS 22 (1977) (discussing the history of the development of staff in congress from 1885 to 1976).

²⁰⁴See *supra* Part IV-C.

²⁰⁵See Patterson, *supra* note 113, at 251.

²⁰⁶Balutis, *supra* note 194, at 106, n.1. Phrase coined by Alan Rosenthal.

²⁰⁷See Patterson, *supra* note 113, at 239 ("[F]or most members being a state legislator is a vocation. Two thirds . . . in 1988 indicated they were full time legislators. At the same time two thirds of the House members and three fourths of the senators reported pursuing a second occupation as well").

decentralized agencies; some central agencies are part of the legislative process and even involved in making policy, others are very removed from the process.²⁰⁸

Despite each state's unique political culture, commentators feel free to judge the content, style and method, and quality of Ohio's legislative process and record keeping by a Washington standard: if they are not the same, then Ohio's must be inferior; or in the case of legislative history, non-existent. Even political and government insiders in Ohio, including LSC staff and lobbyists, will say there is no legislative history in Ohio, because the accepted definition of legislative history, even for the insiders, is that which is maintained by Congress. If other key aspects of political culture in Columbus differ from Washington, should we expect the legislative history to be the same?

State organizations reflect and serve the culture of their own state and political community.²⁰⁹ Yet, those within the states do not always appreciate the utility of their uniqueness; instead they look to Washington as a measuring stick to evaluate and describe themselves. I believe this is precisely what is going on in Ohio when lawyers say "there is no legislative history in Ohio." I believe they only mean that Ohio does not have the type or quantity of legislative history as Congress. Meanwhile, for seventeen years Ohio courts have recognized LSC documents as helpful in determining legislative intent.

VI. ACCESS AND AWARENESS

Forty years ago, some judges did not consider federal legislative history to be sufficiently accessible to lawyers and the general public for the Supreme Court in fairness to use it in their decisions.²¹⁰ Today, access to federal legislative history is not considered to be a problem.²¹¹ Is access to Ohio legislative history a problem?

Many researchers attempt to approach state legislative history using federal legislative history as their conceptual framework. Using the federal conceptual

²⁰⁸See generally Brian Weberg, *Changes in Legislative Staff*, in THE JOURNAL OF STATE GOVERNMENT 190 (1989) (describing other staffing differentials such as degree of centralization v. decentralization, degree of specialization, and degree of influence on policy-making).

²⁰⁹See JOHNSTON, *supra* note 108, at 65 (describing institutional conservatism in the Ohio legislature: "If it works, why fix it? is an Ohio attitude.").

²¹⁰See *United States v. Public Util. Comm'n of Ca.*, 345 U.S. 295, 319-21 (1953) (Jackson, J., concurring) (Justice Jackson was concerned that some of the attorneys involved could not view the legislative history that the majority relied upon until only a short time before arguments).

²¹¹See Brudney, *supra* note 155, at 59, n.239, citing HENRY M. HART, JR. & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAWS 1278-83 (10th ed. 1958) (noting that even then, there were "three or more depository libraries for U.S. government documents in every state and . . . the Congressional Record and committee reports are routinely collected in these libraries"). Today, Westlaw and LEXIS make committee reports available to those who can purchase the service.

framework may be an obstacle in the search for and recognition of Ohio legislative history. The formats and quantity are different. Federal legislative history seems more elegant, and the verbatim records allow the researcher the luxury of finding a complete picture of the process of enactment of a bill.

Ohio legislative history in contrast is minimalist. The researcher will have to resort to microfilm to recover many "hard copy" documents²¹² and microfilm research can be tedious. Yet, Ohio legislative history seems to be available at the same or similar locations as federal legislative history. Both are available from on-line services.²¹³ Both are preserved partially on microfilm. Both are available at many of the same libraries.²¹⁴ The vast quantity of federal history in general does not guarantee that one will always find Congress's intent any more than the scarcer quantity of Ohio history guarantees that one will not.

If it is commonly said that there is no legislative history in Ohio, and yet meanwhile, Ohio courts are recognizing LSC bill analyses as legislative history, some attorneys must be using these documents as part of their arguments. Obviously, they know what it is and where to find it. Do they have a connection to government, the legislature, or a lobbying group? Are they all based in Columbus, or do they come from all over the state? Are they privileged in any way? Access was not a problem for them, so it might be interesting to find out more about their identities.

An exhaustive study of the identities of these attorneys is beyond the scope of this paper but a brief empirical sample may be enlightening. I examined the records of ten recent cases decided by the Ohio Supreme Court that cite LSC bill analyses as legislative history to determine if any pattern was obvious from the briefs.²¹⁵

This sample is small and unscientific, more impressive for its variety than for any clear patterns. Prosecutors, defense attorneys, city attorneys, and attorneys in private practice from both large and small firms used LSC bill analyses. The cases in which the LSC bill analyses were visible in the briefs originated in urban areas in Ohio. Rural *attorneys* were not represented; rural *clients* had urban firms representing them. Eight of the cases came from counties with large cities or from suburban areas near large cities and two came from rural counties. The two cases originating in rural counties had client

²¹²See *supra* text accompanying note 38.

²¹³See generally PUTNAM & SCHAEFFGEN, *supra* note 146, at 247-74 (listing and evaluating computer sites available in Ohio for legal research).

²¹⁴See *supra* text accompanying note 38.

²¹⁵I began with ten recent Ohio Supreme Court cases. Most, if not all, pre-1997 cases are also excerpted in William Heaphy's memo. Using the docket numbers, I asked the librarian at the Supreme Court library for the file containing the briefs for each case. Then I proceeded to look for who was citing the LSC analysis. In most of the briefs, the analysis was listed in the table of authorities of the brief or in the appendix to the brief. In four cases, I could not find a citation to LSC, even by reading the briefs, but the court mentioned LSC bill analyses in its decision anyway. In at least one of these, the statute at issue, but not the LSC analysis, was discussed in the briefs.

representation by lawyers based in urban law firms. In one rural case, it appears that the court made use of a LSC bill analysis even though it did not appear in the briefs. Based on this small unscientific sample, it appears that attorneys from urban areas in Ohio might use LSC bill analyses more often than rural attorneys.

In seven cases, the briefs contained mention of LSC documents. In two of these seven cases, both sides used LSC bill analyses in their arguments. In five cases, only one side used LSC bill analyses in their arguments. The attorneys on each side came from a variety of settings and included large firms, small firms, and government. Seven of the cases were criminal in nature and four were civil. No single judge wrote significantly more of the opinions than another.

Three cases did not have any record of LSC documents in the briefs. Two of these opinions were written by Justice Resnick. In *Felton v. Felton*, Southeastern Ohio Legal Services represented appellant, with amici curiae briefs by attorneys representing Ohio National Organization for Women, Ohio NOW Education and Legal Fund, Action Ohio, Ohio Domestic Violence Network, and National Center on Women and Family Law.²¹⁶ Appellee was not represented. In the later Resnick case, *State v. Williams*, appellant was represented by the City Solicitor and City Prosecutor from Cincinnati. The third case was a dispute between two state agencies, *Office of Consumers Counsel v. Public Utilities Commission of Ohio*, and was written per curiam.²¹⁷ The attorneys for appellant OCC were OCC staff attorneys; the attorneys for appellee PUCO included assistant attorneys general and an attorney in private practice represented McClure Telephone Company.

Of the remaining seven cases, the citations to LSC bill analyses were relatively easy to find in the Table of Authorities or in the Appendix of the briefs, either cited directly or through an earlier case that cited LSC analysis of a pertinent statute.

In *State v. Awkal*, appellee was represented by assistant prosecuting attorneys from Cuyahoga County; appellant was represented by McGinty, Gibbons &

²¹⁶*Felton v. Felton*, 679 N.E.2d 672, 674 (Ohio 1997); *State v. Williams*, 683 N.E.2d 1126 (Ohio 1997). The issues were related to new statutes intended to criminalize domestic violence and specifically to authorize courts to issue protection orders. Williams cites the court's use of LSC bill analysis in *Felton* to confirm the intent of the General Assembly to criminalize the activities and authorize ex parte protection orders. The briefs addressed the statutes but not the LSC bill analyses. *Williams*, 683 N.E.2d at 1128.

²¹⁷*Office of Consumers' Counsel v. Pub. Utilities Comm'n*, 638 N.E.2d 550, 552 (Ohio 1994). At issue was whether the legislature intended to "dispense with the notice and hearing requirements in the ratemaking process for small telephone companies," in contrast to the traditional ratemaking process where ratepayers and the OCC do participate. *Id.* The LSC bill analysis confirms the legislative intent to not require notice or hearing. The briefs addressed the statutes but not the LSC bill analysis.

Hilow Co., L.P.A.²¹⁸ The prosecutors cited an earlier case that quoted an LSC Comment in a bill analysis. The opinion was written by Justice Pfeifer.

In *State v. Economo*, appellant was represented by Cuyahoga County assistant prosecuting attorneys; appellee by Arthur P. Lambros and Thomas Paris of Cleveland.²¹⁹ Both sides used the same LSC bill analysis comment in their briefs. The opinion was written by Justice Cook.

In *State v. Moaning*, appellant was represented by Montgomery County prosecuting attorneys; appellee by Daniel E. Brinkman. A brief by counsel for appellee was not in the file given to me by the Supreme Court librarian. The prosecuting attorneys quoted LSC. The opinion was written by Justice Stratton.²²⁰

In *State ex rel. Ohio AFL-CIO v. Voinovich*, relators seeking a writ of mandamus were represented by Stewart Jaffy & Associates Co., L.P.A., Rishel, Myers & Kopech, Esther S. Weissman Co., L.P.A. and amicus curiae by the Ohio Academy of Trial Lawyers. Respondents were represented by the Attorney General, the State Solicitor, Porter, Wright, Morris & Arthur, and amici curiae by Vorys, Sater, Seymour & Pease. The dissenting opinion by Justice Sweeney mentioned the LSC bill analysis.²²¹ Attorneys from Stewart Jaffy & Associates used a twenty-page LSC bill analysis to illustrate the number of changes made to existing law.

²¹⁸*State v. Awkal*, 667 N.E.2d 960, 966 (Ohio 1996). The issue was the evidence of prior calculation and design to commit a crime. The prosecution used a LSC bill analysis Comment, cited in *State v. Cotton*, 381 N.E.2d 190, 193 (Ohio 1978), to emphasize that length of time did not determine whether an accused acted with prior calculation and design. *Awkal*, 667 N.E.2d at 967.

²¹⁹*State v. Economo*, 666 N.E.2d 225, 227 (Ohio 1996). At issue was the corroboration requirement for the crime of sexual imposition. The state wanted to abolish the requirement and emphasized that the intent of the legislation was unwise. The defendant emphasized that the LSC Comment stated the corroboration rule is justified because of the "ease with which this crime may be abused in prosecution." *Id.* at 229.

²²⁰*State v. Moaning*, 666 N.E.2d 1115-16 (Ohio 1996). At issue was whether the legislature intended to prohibit a person who had been convicted of attempted drug abuse from carrying a firearm under OHIO REV. CODE ANN. § 2923.13(A)(3) which prohibits having a weapon while under disability. The court used the LSC comment to support its interpretation of the language of the statute, and as an "indication of the legislature's intent to broaden the scope of the disability statute." *Id.* at 1116.

²²¹*State ex rel. Ohio AFL-CIO v. Voinovich*, 631 N.E.2d 582, 585 (Ohio 1994). Two of the four issues presented were whether the substantive changes in the workers compensation system as part of a workers compensation appropriations bill violated 1) the three-consideration provision and 2) the one-subject rule of the Ohio Constitution. The dissent argued that "what started as a simple appropriations bill, now contained massive substantive law changes to the workers' compensation system," and said the "magnitude of the changes . . . is demonstrated by the LSC Comparison of Current and Prior Workers' Compensation Law . . . [i]t takes twenty pages to list the changes made by the bill." These facts were part of the dissent's argument that "what occurred here is a classic example of the 'logrolling' forbidden by the one-subject rule. . . ." *Id.* at 601-02.

In *State v. D'Ambrosio*, a death penalty case, appellee was represented by prosecuting attorneys from Cuyahoga County and appellant was represented by John F. Norton and John H. Higgans. Attorneys for the appellant cited *State v. Cotton*, which quoted a LSC bill analysis.²²²

In *Harris v. Atlas Single-Ply Systems*, appellants were represented by the Attorney General with amicus curiae by Ross, Brittain & Schonberg Co. for Ohio ABC Inc., and appellee by Vorys, Sater, Seymour & Pease with amicus curiae by Benesch, Friedlander, Coplan & Aronoff for the Ohio State Building and Construction Trades Council. The concurring opinion written by Justice Douglas cited the LSC Summary.²²³ Amicus curiae for appellants cited *Harris v. Van Hoose* that used a LSC bill analysis to argue legislative intent.

In *In re Annexation of 311.8434 Acres of Land v. Lewis*, appellees were represented by Schwartz, Manes & Ruby, a Cincinnati firm; the appellants by Sheldon A. Strand, and Leslie S. Landen, Middleton Law Directors. Both sides used LSC bill analyses in their briefs, but cited different house bills for different statutes. The opinion was written by Justice Holmes.²²⁴

Slightly different results could be construed from a LEXIS search that included all Ohio courts and reported and unreported cases. These came from a much wider range of counties than found in this sample of ten.²²⁵ Of the lower

²²²*State v. D'Ambrosio*, 616 N.E.2d 909, 912 (Ohio 1993). An issue was the appellant's prior calculation and design. The court quoted a LSC comment quoted in *State v. Cotton*, 381 N.E.2d 190, 193 (Ohio 1978) in its discussion of the requirements for prior calculation and design. *Id.* at 918.

²²³*Harris v. Atlas Single-Ply Sys.*, 593 N.E.2d 1376-77 (Ohio 1992). At issue was whether the language of the statute of limitations regarding unpaid minimum wages could be applied in an action by an employee for the payment of prevailing wages and thus require that the Department of Industrial Relations bring an action on behalf of employees within two years. The concurring opinion quoted a LSC summary cited in *Harris v. Van Hoose*, 550 N.E.2d 461, 463 (Ohio 1990) and concluded that any limitation periods in the statute applied only when a prevailing wage law violation existed and so did not apply to this case. *Id.* at 1378.

²²⁴*In re Annexation of 311.8434 Acres of Land v. Lewis*, 597 N.E.2d 460, 461 (Ohio 1992). At issue was whether township trustees could appeal the approval of a landowner's petition for annexation. Appellants used the bill analysis of H.B. 412, and appellees used the bill analysis for H.B. 175. The court used the LSC analysis of H.B. 175 to find the purpose of the amendment to section 505.62 of the Ohio Revised Code and found that the amendment only conferred standing on township trustees to appeal denial of an annexation petition and was a response to the court's denial of that standing in *In re Appeal of Bass Lake Community, Inc.*, 449 N.E.2d 771 (Ohio 1983), which did not change the procedure for allowance of a landowner's petition for annexation. Landowners were provided broader appeal rights under Chapter 2506 of the Ohio Revised Code. Appellants claimed there was a conflict between the procedures. The court of appeals had ruled that the legislature provided concurrent remedies. *Lewis*, 597 N.E.2d at 462.

²²⁵I conducted a boolean search for all cases in all Ohio courts in which the phrase "Legislative Service C" occurred. This type of search will retrieve any case where LSC is mentioned at all and yielded a total of 213 cases from 1958 through 1997, including 54 Supreme Court cases, 93 appellate court cases, 56 unreported appellate court cases,

court cases, urban counties were more heavily represented than rural counties, but rural counties still were represented. There were urban counties, suburban, and rural counties in the search results. Of the reported appellate cases, approximately 25% were from rural county districts, the remaining 75% from urban or suburban counties. Of the unreported appellate cases, slightly fewer than 20% came from rural county districts; the remaining 80% from urban or suburban counties. Of the ten miscellaneous cases, one-third came from rural counties.²²⁶

To put this in context, one must remember that Ohio has few purely rural counties or appellate court districts; it has five major industrial cities, a state capital that is larger in population than any of the industrial cities, and numerous small industrial cities.²²⁷ It is arguable whether there are any truly remote rural areas in Ohio, except possibly southeastern Ohio. But the Fourth Appellate District was relatively well represented in the LEXIS search results with a total of fourteen appellate cases.²²⁸ It is possible that rural attorneys do not have equal access to Ohio legislative history; they may have to rely on on-line services such as Hannah Information Systems for state legislative history (and LEXIS and Westlaw for federal legislative history) if they do not have time to drive one to three hours to Columbus and back for research. A

and 10 miscellaneous court cases.

²²⁶I classified collar counties surrounding urban counties as suburban rather than rural. I defined "rural" as not urban or suburban. Of ninety-three reported appellate court cases, twenty-two came from rural counties; of fifty-six unreported cases, nine came from rural counties; of ten miscellaneous cases, three came from rural counties.

²²⁷Knepper, *supra* note 191, at 3 ("Ohio . . . has an extraordinary number of industrial cities. Prior to World War II, it had more cities with over 100,000 population than did any state, and they were widely distributed across its area, with only the southeast quadrant lacking a major city. Twenty smaller cities, in the 25,000 to 85,000 population range, were also widely distributed").

²²⁸The LEXIS search yielded thirteen reported cases and one unreported case citing LSC from the Fourth Appellate District, which includes Pickaway, Ross, Highland, Adams, Pike, Scioto, Hocking, Vinton, Jackson, Lawrence, Gallia, Meigs, Athens, and Washington Counties. See PUTNAM & SCHAEFGEN, *supra* note 146, at 129 (Court of Appeals District Map). Of Ohio's twelve appellate districts, only four do not include a county that borders or contains a city. One, the Fifth District, consists of fifteen counties, and includes some collar counties of Columbus, and the smaller city of Mansfield, in addition to rural areas such as Holmes County. The Fifth District had a total of six appellate cases citing LSC. The Seventh District in central eastern Ohio had six cases citing LSC. The Third District, in northwestern Ohio, a predominantly agricultural area, between but not including the Dayton and Toledo areas, had only two cases. Other factors, such as the opinions of the judges and their clerks about Ohio legislative history, may affect the use of LSC analyses, because location and rural nature of a district do not consistently correlate to a demonstrated lack of access. This is very rough data and I relied on my general knowledge of Ohio to determine which districts were rural and non-rural.

superficial look at these search results does not provide such a simplistic answer.²²⁹

It would be useful at another time to look at all the briefs for all the cases in which LSC bill analyses are used, including counties that are not major urban area. The subject of access is ripe for further research because the preliminary data is inconclusive.

VII. CONCLUSION

It is difficult to come to conclusions about the reasons for the gap between the use of legislative history by Ohio courts, and its official acknowledgement in scholarly articles. Ohio's version of legislative history might filter into general awareness from the practicing attorney up to the scholarly writers rather than the other way around. The conservatism I described as part of Ohio's political culture may also influence lawyers's statements and observations about Ohio legislative history.

We could be on the verge of an upward swing in awareness.²³⁰ A few things are different now. The commentaries that use LSC as evidence of legislative intent, even without an explicit recognition of the source as legislative history, have increased recently.²³¹ A new Ohio Legal Research Guide will clarify for many where to find what is available in Ohio.²³² Lawyers may be taking baby steps towards recognition of Ohio's unique sources. Moving slowly and cautiously towards change is not an unusual phenomenon in Ohio.

I have answered some of the questions I raised in the introduction of this article. Commentators and attorneys have relied on a limited definition of legislative history; I have tried to persuade you to expand your definition. There is at least a lack of perceptiveness, if not a misunderstanding, about how the political culture of a state influences its institutions and their operations. I cannot find any solid evidence to suggest that some lawyers have inside information that others do not have equal access to, although that is a question that deserves more research. It should be apparent by now that many are ignoring what is both obvious and available, because of concrete thinking, or cultural ethnocentrism, or a federal bias, or because they equate quantity with

²²⁹*Cf.*, Knepper, *supra* note 191, at 12. Rural Ohio is well-represented in the General Assembly, from 1945 to the 1990's. "Ohio's major cities were also hampered by underrepresentation in the state legislature . . . [T]he 'cornstalk brigade' was exerting a disproportionate influence on state spending." *See also supra* text accompanying note 211.

²³⁰There were six Supreme Court cases in 1997 citing LSC bill analysis, five in 1996, none in 1995, three in 1994, one in 1993, three in 1992, nine in 1991, four in 1990, two in 1989, one in 1988, two in 1987, none in 1985, one in 1984, four in 1982, three in 1981, and five in 1980, including *Meeks*.

²³¹*See supra* text accompanying note 22.

²³²PUTNAM & SCHAEFGEN, *supra* note 146.

quality.²³³ Are we merely in a time lag before the legal community comes to agreement? That remains to be seen.

I have tried to put together the pieces of the political and legislative puzzle that is Ohio. Some pieces of the puzzle are still missing, particularly those that would fill in the gaps about access and awareness. One part of the picture is clear, though; there is legislative history in Ohio.

²³³Alternatively, because most law schools do not require students to take a Legislation course, many lawyers do not understand federal or state legislative process, or the various theories and methods of statutory interpretation, as well as they understand the common law. See generally Otto Hetzel, *Statutory and Constitutional Interpretation: Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. PITT. L. REV. 663 (1987)(arguing that all law students need a course that teaches legislative process, explains the behavioral norms of legislative institutions, and analyzes theories of statutory interpretation).